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No.

In the Supreme Court of the United States

October Term, 1995

IN RE: ALCAN ALUMINUM CORPORATION

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE A. SALIBRA, II
Counsel of Record
JOHN C. TILLMAN
Alcan Aluminum Corporation
100 Erieview Plaza, 17th Floor
Cleveland, Ohio 44114
(216)253-6918

Attorneys for Petitioner
Alcan Aluminum Corporation

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO 216-621-5647

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Second Circuit usurped its non-discretionary appellate authority by denying Alcan Aluminum Corporation's Application for a Writ of Mandamus requesting the appellate court to vacate a remand order issued by the Untied States District Court for the Northern District of New York in direct contravention with the remand instructions set forth in the Second Circuit's decision entitled *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993), and in a manner that has the net affect of eliminating the notions of *res judicata* and law of the case and creates an indefinite stream of litigation designed to force capitulation of parties whose actions did not cause or contribute to environmental problems at a Superfund Site.

RULE 29.1--STATEMENT

Petitioner, Alcan Aluminum Corporation, is a wholly-owned subsidiary of Alcan Aluminium Limited, a Canadian Company.

RULE 14.1.(b) STATEMENT

The parties to the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit include:

- The United States of America and the State of New York, Plaintiffs
- Alcan Aluminum Corporation, Defendant/Third-Party Plaintiff
- Cornell University, Third-Party Defendant

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OPINIONS BELOW

On April 6, 1993, the United States Court of Appeals for the Second Circuit issued its decision granting, in part, and reversing, in part, a Memorandum-Decision and Order of the United States District Court for the Northern District of New York. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993).[1] The decision of the Second Circuit is reprinted in the Appendix at A1-40.

Thereafter, on September 10, 1994, the District Court issued an Order concerning the scope of remand which became effective on September 12, 1994 and is reprinted in the Appendix at A78-82. The District Court denied Alcan Aluminum Corporation's Motion for Reconsideration by Order dated December 24, 1994, and entered on December 28, 1994; reprinted in the Appendix at A83-87.

Alcan Aluminum Corporation filed an Application for Writ of Mandamus in the United States Court of Appeals for the Second Circuit, which was denied by Order dated May 17, 1995, and is reprinted in the Appendix at A88.

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[1] The United States District Court for the Northern District of New York's Memorandum-Decision and Order is entitled *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991) and is reprinted in the Appendix at A41-77. The action, Case No. 87-CV-920, is pending before the Honorable Thomas J. McAvoy, Chief Judge, and has been consolidated with Case No. 91-CV-1132.

JURISDICTION

Subject matter jurisdiction in the United States District Court for the Northern District of New York was predicated on 28 U.S.C. §1391(b) and 42 U.S.C. §9613(b).

Petitioner Alcan Aluminum Corporation timely filed an Application for Writ of Mandamus with the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1651(a) and Rule 21(a) of the Federal Rules of Appellate Procedure. The Court of Appeals denied the Application by Order dated May 17, 1995.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1651(a) and in accordance with Rule 20 of the Rules of the Supreme Court of the United States.

Title 28, §1651(a) of the United States Code provides:

> The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and applicable to the usages and principles of law.

28 U.S.C. §1651(a) (West Publishing Co. 1995).

THE STATUE INVOLVED

Title 28, §1651(a) of the United States Code:

> The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and applicable to the usages and principles of law.

28 U.S.C. §1651(a) (West Publishing Co. 1995).

STATEMENT OF THE CASE

This case was filed by the United States and the State of New York against Petitioner, Alcan Aluminum Corporation ("Alcan") under §107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607 ("CERCLA"). Plaintiffs seek to hold Alcan jointly and severally liable for costs stemming from Alcan's disposal of a water-oil emulsion at the Pollution Abatement Services ("PAS") in Oswego, New York.

The United States District Court for the Northern District of New York issued a Memorandum-Decision and Order holding Alcan jointly and severally liable for all unreimbursed response costs incurred by plaintiffs. *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991) (A41-77) Following a timely appeal, the United States Court of Appeals for the Second Circuit reversed, in part, and granted, in part, the lower court's decision, and held that the lower court erred in failing to afford Alcan the opportunity to demonstrate that the environmental harm to the PAS site was divisible and capable of reasonable apportionment. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721-23 (2d Cir. 1993) (A1-40) (hereinafter "*Alcan-PAS*"). The lower court's judgment was reversed and the case remanded based on "differing contentions supported by expert affidavits" concerning the environmental impact of the below background metal constituents in the emulsion that subjected Alcan to CERCLA liability. *Alcan-PAS*, 990 F.2d at 722-23.

On September 10, 1994 the District Court issued an Order in direct contravention to the remand instructions set forth in *Alcan-PAS* (A78-82) (hereinafter "Remand Order"). The Second Circuit mandate expressly directed the lower court to hold a divisibility hearing and apportion damages relating to the environmental impact of trace metal constituents. The Remand Order, however, permits

plaintiffs' to introduce additional evidence at the remand hearing and to relitigate the liability phase of this case which previously determined the nature of the Alcan emulsion. The District Court denied Alcan's Motion for Reconsideration on December 28, 1994. (A83-87)

The result of the Remand Order was that the Second Circuit's mandate was ignored and will go unenforced since the lower court refused to confine the scope of the remand hearing to the terms of the mandate, amounting to an usurpation of appellate authority. Accordingly, Alcan filed an Application for Writ of Mandamus in the Second Circuit to vacate the Remand Order and to compel compliance with the *Alcan-PAS* Mandate. The Writ was denied by the Second Circuit on May 17, 1995 without written decision. (A88)

Alcan respectfully requests that this Honorable Court issue a Writ of Mandamus to the United States Court of Appeals for the Second Circuit[2] to correct the lower courts' mistake in construction and misapplication of the *Alcan-PAS* mandate, and to compel the Second Circuit to comply with and enforce its mandate. The relief sought in this Petition is not available in any court other than the Supreme Court of the United States since the Second Circuit declined to correct the misconstruction and misapplication of the *Alcan-PAS* mandate by denying Alcan's Application for Writ of Mandamus. (A88)

STATEMENT OF FACTS

A. Factual And Procedural History

This is an action under §107 the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607 ("CERCLA"), filed by the United States

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[2] The Second Circuit's May 17, 1995 Order was issued by the Honorable Jon O. Newman, Chief Judge, the Honorable Richard J. Cardamone, and the Honorable J. Daniel Mahoney. (A88)

and the State of New York (hereinafter "plaintiffs" or "the government") against Alcan seeking the imposition of joint a several liability for the disposal of a water-oil emulsion at the Pollution Abatement Services site ("PAS") in Oswego, New York.[3] Both parties to this case completed discovery in the lower court and cross-moved for summary judgment:

> After discovery had been completed, the government moved for summary judgment against Alcan contending that Alcan's disposal of hazardous substances at PAS had been conceded. Alcan cross-moved for summary judgment against the United States and New York State, asserting principally that CERCLA's definition of "hazardous substances" requires a minimum concentration level of specific compounds and that under the statute causation needed to be demonstrated. Alcan also asserted that the harm caused by its waste was divisible and that the government claim improperly subjected it to joint and several liability.

Alcan-PAS, 990 F.2d 711, 717.

The government moved for summary judgment on the grounds that the Alcan emulsion was a "hazardous substance" as defined by CERCLA based *only* on detectable amounts of below background metals, and that joint and several liability could therefore be imposed on Alcan. The characterization of the emulsion as containing trace levels of metal compounds was based on nearly ten years of discovery, both administrative and

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[3] The facts of this case are set forth in detail in the January 15, 1991 Memorandum-Decision and Order, *United States v. Alcan Aluminum Corp.*, 755 F.Supp. 531 (N.D.N.Y 1991) (hereafter "*Alcan*") (A41-77), and in *Alcan-PAS*, 990 F.2d 711 (A1-40). Accordingly, only the facts pertinent to this Petition will be recited herein.

judicial, in no less than three CERCLA actions against Alcan.

Alcan disputed liability and cross-moved for summary judgment arguing, *inter alia*, that below background metals could not be "hazardous substances" under CERCLA since they are ubiquitous in the environment, and to deem them hazardous would render everything in the universe a hazardous substance under the statute. Alcan also argued that, even if trace metals were a CERCLA hazardous substance, they could cause no harm to the environment. Accordingly, Alcan argued that causation had to be an element of liability under the statute. *Id.* at 716-17. Finally, Alcan argued that, if the metal compounds rendered the emulsion a hazardous substance, it could not be held jointly and severally liable, or liable at all, since the environmental problems at the PAS site were caused by PCB's and other constituents that were *not* in the emulsion:

> Alcan declares that the response actions at PAS were attributable to substances such as PCB's, nitro benzene, phenol, dichlonoethone, toluene, and benzene. It contends that no soil contamination due to heavy metals was found there, and insists that the metallic constituents of its oil emulsion are insoluble compounds, submitting an affidavit supporting this theory of divisibility.

Id. at 722.

The government did not contest the fact that the oil emulsion contained only below background metals and never raised the possibility that the emulsion may contain other hazardous substances. *See, generally, Alcan-PAS.* The government did, however, place in dispute the issue of whether the below background metals could have caused or contributed to environmental harm at the Site:

> The government submitted a declaration stating that metal contaminants like those found in Alcan's waste emulsion were present in environmental media at PAS, that the commingling of metallic and organic hazardous substances resulted in indivisible harm, and that though some forms of lead, cadmium and chromium are insoluble, they may chemically react with other substances and become water soluble.

Id. at 722.

The lower court granted the government's summary judgment motion and denied Alcan's cross-motion. *Alcan,* 755 F. Supp. at 537-39. The lower court rejected Alcan's causation and divisibility arguments and held Alcan liable for all unreimbursed response costs incurred by plaintiffs. *Id.* at 541-42.

B. The Mandate Of The Second Circuit

Alcan appealed the lower court's ruling to the Second Circuit Court of Appeals. On April 6, 1993, the Second Circuit issued its decision affirming, in part, and reversing, in part, the lower court's ruling. *Alcan-PAS,* 990 F.2d at 725. The Second Circuit affirmed liability against Alcan, but based on the nature of the Alcan emulsion, reversed the lower court's imposition of joint and severable liability and ordered the lower court to conduct a divisibility hearing to assess the environmental impact, if any, of trace metals. *Id.* at 722. The Second Circuit expressly recognized that causation was a required element of CERCLA for purposes of apportionment, and that Alcan was entitled to show that the harm, if any, from trace metals was divisible and capable of reasonable apportionment. *Id.* at 722.

The *only* evidence, according to the Second Circuit, that precluded the entry of summary judgment on the divisibility issue was the governments' expert affidavit implying that below background metals could cause

harm. *Id.* at 722-23. Based on that disputed fact, the Second Circuit remanded this case to the district court for resolution of the dispute as to the impact of metals, since that issue alone precluded the grant of summary judgment on the divisibility issue:

> These differing contentions supported by expert affidavits raise sufficient questions of fact to preclude the granting of summary judgment on the divisibility issue.

Id. Thus, on remand, the only dispute of fact remaining to be resolved by the district court related to the environmental impact of metals.

C. Post Remand Proceedings

After the Second Circuit issued its decision in *Alcan-PAS*, the lower court invited all parties to submit briefs regarding the proper scope of remand mandated by the Second Circuit.

Realizing that there was virtually no prospect that the government could rebut the fact that below background metals could not create an environmental problem, it became imperative for the government to recharacterize the Alcan emulsion, notwithstanding the fact that the Second Circuit, as well as the Third Circuit in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992) (hereinafter "*Alcan-Butler*"), remanded to the district court for the explicit purpose of resolving those issues raised with respect to trace metals. Accordingly, the government requested the lower court to re-open discovery so it may develop and present new evidence on new materials, and alleviate the need for the divisibility hearing to which the Second Circuit held Alcan was entitled.

Alcan argued that the governments' request would violate directly the *Alcan-PAS* mandate, and would undermine the authority of the Second Circuit. Alcan

referred to the fact that the Second Circuit reversed the district court's holding that Alcan did not have the right to demonstrate that background metals could not cause or contribute to remedial costs at PAS.

Alcan also asserted that the law of the case doctrine and *res judicata* principles precluded the district court from revisiting the nature of Alcan's emulsion, since to do so would ignore the existence and legal effect of Alcan's cross-motion for summary judgment. Further, Alcan pointed out that, in *Alcan-PAS*, the Second Circuit essentially mandated a damages remand similar to a bifurcated case where the determination on liability was completed and a second hearing was necessary for apportionment of damages based on the liability as established. *Alcan-PAS*, 990 F.2d at 720.

The district court, refusing to acknowledge the fact that Alcan filed a cross-motion and that its ruling with respect to divisibility was reversed, characterized the remand issues as follows:

> The threshold question before the court is whether evidence of the presence of additional pollutants in Alcan's wastestream, beyond the undisputed background metals contained therein, is barred from the apportionment divisibility hearing by the law of the case doctrine. *Specifically, this Court must determine whether the Second Circuit's affirmation of the district court's grant of summary judgment on the issue of liability based on the presence of certain metals' in Alcan's waste constitutes a finding that the waste did not contain other hazardous substances.*
>
> Alcan argues that it is not appropriate for the plaintiffs to introduce further evidence as to the character of ALCAN's waste for two reasons. First, the legal doctrine of the law of the case precludes

> revisiting the issue of whether ALCAN's waste contained pollutants other than the below-background level metals upon which the district court established liability. Second, additional evidence should be disallowed based upon the doctrine of res judicata. The Court will address these arguments seriatim. (Emphasis added.)

September 10, 1994 Remand Order. (A79-80)

On September 10, 1994, the Honorable Judge Thomas J. McAvoy issued the Remand Order permitting the "introduction of additional evidence regarding the issue of whether Alcan's waste stream contained PCBs, VOCs, or other materials." (Remand Order, A-81) The Remand Order, in essence, adopted the government's argument that *Alcan-PAS* did not determine that the Alcan emulsion "did not contain other hazardous substances," and that the government "only went as far as necessary to establish liability on summary judgment." (Remand Order, A-80)[4] Alcan's Motion for Reconsideration was denied by Order dated December 24, 1994. (A83-87)

By virtue of the Remand Order issued by Judge McAvoy, the government was now permitted to relitigate the liability phase of this case which previously determined the nature of the emulsion in an attempt to impose response costs on Alcan based on separate and distinct grounds never raised or preserved at the summary judgment stage.

Accordingly, Alcan filed an application for Writ of Mandamus with the Second Circuit requesting the appellate court to compel the lower court to comply with

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[4] The government's assertion that, following years of discovery that included testing and sampling of Alcan's emulsion, they decided to move for summary judgment based on trace metals and ignore potential PCBs is implausible and contrary to their position in *Alcan-Butler*.

the directions of the April 6, 1993 mandate. The Application was denied by Order dated May 17, 1995, without written decision. (A88) Thus, the *Alcan-PAS* mandate continues to be ignored and remains unenforced. The lower court refused to confine the scope of the remand hearing to the terms of the *Alcan-PAS* mandate, and the Second Circuit failed to compel the lower court to confine the scope of remand to the terms of the mandate. This amounts to an usurpation of appellate authority and Mandamus should issue to correct the misconception of the scope and effect of the appellate mandate, and to prevent relitigation of issues already decided.

The Remand Order as unrestricted by the Second Circuit fails to recognize that the remand was not based on the affirmance of the lower court's grant of summary judgment on the liability issue, but instead, related to the district court's conclusion on divisibility. The lower court's findings on the divisibility issue were expressly reversed. *Alcan-PAS*, 990 F.2d at 721-23. The remand stemmed only from a dispute of fact between Alcan's experts and those of the government as to the impact of the below background metals as prerequisite to determining whether Alcan's motion for summary judgment should be granted. *Id.* at 722-23.

The appellate court failed to give full effect to the April 6, 1993 mandate by ignoring the fundamental holding of *Alcan-PAS,* by ignoring the existence of Alcan's cross-motion, and by recharacterizing the mandate as merely affirming the lower court's Memorandum-Decision and Order. The Second Circuit failed to correct this mistake and misapplication of the *Alcan-PAS* mandate.

Confirmation that the remand hearing mandated by the Second Circuit was intended to involve exclusively the impact of metals is illustrated in the Third Circuit's

decision in *Alcan-Butler* explicitly adopted by the Second Circuit:

> [W]e think the tension may be resolved by allowing a responsible party, like Alcan, to pay nothing if it can demonstrate that its pollutants, when mixed with other hazardous wastes, did not contribute to the release or the resulting response costs. In this respect we essentially adopt the Third Circuit's reasoning in [*Alcan-Butler*] . . . This approach is not intended to provide an escape hatch for CERCLA defendant's rather, it will permit such a defendant to avoid liability only when its pollutants contribute no more than background contamination.

Alcan-PAS at 722. A review of the Third Circuit's reasoning in *Alcan-Butler* confirms that the mandated divisibility hearing was to relate exclusively to the impact of background metals:

> Alcan maintains that there is no need for a hearing because, not only is the harm divisible, but its relative contribution to the injury to the Susquehanna River is zero. According to Alcan "[i]t is technically impossible to have a release or threatened release such that a clean-up would be authorized or justified under the National Contingency Plan as a result of the addition of metal compounds in the Alcan emulsion to the Butler Site. When one adds two materials that have the *same* concentrations of an element or compound, the net result is the same concentration. It can never result in a higher concentration."

Alcan-Butler, 964 F.2d at 269-70 (citations omitted). The Third Circuit further noted that because the district court believed that the lower court's opinion in this case, *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991) was dispositive, it "did not specifically address this issue," and since it noted "it is

not the proper forum to consider Alcan's argument," it returned the case to the district court and specifically directed it to "re-evaluate Alcan's contention in light of the facts developed in the hearing on *this* issue." *Alcan-Butler*, 964 F.2d at 270 (emphasis added).

Moreover, the Second Circuit's refusal to enforce its mandate exposes Alcan to an unending stream of litigation in which the government can attempt to impose liability upon Alcan for its emulsion element by element and compound by compound. The exceptional circumstances of this case, coupled with the fact that adequate relief cannot be obtained in any other court, warrant the exercise of this Court's discretionary powers in accordance with 28 U.S.C. §1651(a) and Rule 20 of the Rules of the Supreme Court of the United States. On this basis, Alcan applies for a Writ of Mandamus.

REASONS FOR GRANTING THE WRIT OF MANDAMUS

A. Mandamus Is Appropriate To Review Compliance With Non-Discretionary Directives Set Forth In A Decision Of The Court Of Appeals

Title 28, §1651(a) of the United States Code provides:

> (a) The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(West Publishing Co. 1995)

The remedy of mandamus will lie to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

Mere error is not sufficient to invoke the mandamus process. *Will*, 389 U.S. at 95. The application must assert an action of the lower court by which it acted beyond its inherent power. *Id.*

B. The Remedy Of Mandamus Is Available To Compel Compliance With The Mandate Of The Second Circuit In *Alcan-PAS*

In this case, Alcan seeks mandamus requesting this Honorable Court to review the lower court's non-compliance with the remand instructions of *Alcan-PAS*. The United States Supreme Court has recognized that a court of appeals has the power to enforce its mandate, and that mandamus is an appropriate remedy to enforce the provisions of a previous judgment of an appellate court. *Bucclo v. Adkins*, 424 U.S. 641 (1976) (*per curium*); *Deen*

v. Hickman, 358 U.S. 57 (1968) (*per curium*). In fact, the Supreme Court has expressly noted that mandamus is appropriate to "confine a lower court to the terms of an appellate tribunal's mandate." *Will*, 389 U.S. at 95-96. *See also United States v. E.I. DuPont deNumours & Co.*, 366 U.S. 316 (1961).

In *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976), the Supreme Court considered an application for writ of mandamus in a case analogous to this matter. The petitioners in *Kerr* filed a mandamus action in the Ninth Circuit Court of Appeals requesting the appellate court to vacate an interlocutory discovery order issued by the district court. The court of appeals denied mandamus without opinion. *Id.* at Syllabus. Petitioners then sought mandamus in the Supreme Court.

Although this Court denied mandamus, it considered the orders of the district and appellate courts, and held that "adequate alternatives to mandamus existed":

> The Court of Appeals' opinion did not foreclose *in camera* review, but apparently left open the opportunity for petitions through responsible officials to assert the privilege more specifically and have their request for *in camera* review considered. They thus have an avenue far short of mandamus to achieve the relief they seek . . . .

Id. at Syllabus (b).

In this case, mandamus is appropriate since Alcan's Application for Writ of Mandamus was previously denied by the Second Circuit, leaving no avenue to achieve the requested relief--compliance with the *Alcan-PAS* mandate. The impact of the Second Circuit's Order is to force Alcan into protracted and duplicative litigation with no alternative other than mandamus.

C. The Procedural History Of This Case Coupled With The

Alcan-PAS Decision Mandates A Hearing On Divisibility Of Harm And Apportionment Of Damages Relating Solely To Below Background Metals

1. The Second Circuit Affirmed Liability Based On Trace Metals And Ordered A Narrow Remand Relating To The Impact Of Metals, The Only Dispute Of Fact Precluding Summary Judgment On The Divisibility Issue

The primary issue presented to the Second Circuit in *Alcan-PAS* was whether the emulsion as characterized in the record on appeal, having been established as a matter of undisputed fact by cross-motions of the parties, subjected Alcan to joint and several liability under CERCLA. Having accepted the nature and characterization of the "hazardous substances" in the emulsion, the Second Circuit expressly held that the lower court erred by failing to provide Alcan the opportunity to establish divisibility of harm based on below background metal compounds. *Alcan-PAS*, 990 F.2d at 722. That holding, based exclusively on metals, becomes the law of the case which must be followed on remand. *City of Cleveland v. FPC*, 561 F.2d at 344, 348 (D.C. Cir. 1977); *In Re: United States Steel Corp.*, 479 F.2d 489, 493-94 (6th Cir. 1973). The law of the case doctrine, when used to express the duty of a lower court to follow what has been decided by an appellate court, "applies to everything decided, either expressly or by necessary implication." *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939).

The rationale underlying remand of the case to the district court involved the fact that the Second Circuit recognized that Alcan was not entitled to summary judgment on its cross-motion because a dispute of fact existed concerning the impact of the metals. *Alcan-PAS*, 990 F.2d at 722-23. The Second Circuit apparently treated the case as though an express bifurcation had

occurred separating the case into two parts--liability and damages. The Court reasoned that the liability inquiry had been concluded, and that liability was properly established on the basis of below background metals. *Id.* at 717-21. However, the Second Circuit held that the district court erred in not holding an apportionment hearing on the response costs, if any, related to the metals.[5] *Id.* at 722-23.

In so holding, the Second Circuit affirmed liability based on metals, but ordered a remand hearing to permit Alcan to demonstrate that below background metals did not cause or contribute to environmental harm. *Id.* The key element of the reversal was based on affidavits submitted by Alcan asserting that trace metal compounds could not cause environmental harm or response costs. The *Alcan-PAS* decision concluded that Alcan was not entitled to summary judgment on the divisibility issue based on an affidavit submitted by the government raising an issue relating only to harm associated with metal compounds. *Id.* The Remand Order ignored the mandate of the Second Circuit under the mistaken assumption that its Memorandum-Decision and Order was affirmed in total. The Second Circuit refused to correct this oversight.

The lower court, under the Second Circuit's May 17, 1995 Order, is now permitted to relitigate the issues of undisputed fact established by the cross-motions and affirmed by the appellate court. The Remand Order permits plaintiffs and the lower courts to undo that which the Second Circuit had previously decided and, in fact, had to decide in order to find Alcan liable, leaving the *Alcan-PAS*

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[5] This inescapable conclusion is further supported by the fact that the lower court as well as the Second Circuit expressly recognized that discovery was completed, and that final resolution of the case was proper. *Alcan*, 777 F.Supp. at 534; *Alcan-PAS*, 990 F.2d at 717.

mandate unenforced. Permitting remand under the Second Circuit decision will render the *Alcan-PAS* mandate void, contrary to the firmly-established hierarchy within the judicial system and contrary to the doctrine of law of the case. *Will v. United States*, 389 U.S. 90, 95-96 (1967); *United States v. Lasker*, 481 F.2d 229, 235 (2d Cir. 1973); *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1992).

The decision of the Second Circuit also allows relitigation of issues previously decided and permits the lower court to re-decide issues already decided and affirmed in *Alcan-PAS*. For example, the lower court granted judgment in favor of Alcan and against third-party defendant Cornell University (hereinafter "Cornell"), and ordered a hearing to determine the fair share amount of Cornell's liability. *Alcan*, 755 F. Supp. 545. Judge McAvoy made certain findings at the fair share hearing, and noted that:

> Indeed, the real dispute between the parties was not whose waste was more toxic, but rather whose waste was less non-toxic. Cornell contends that this is a relevant factor to be examined by the Court.

December 27, 1991 Memorandum-Decision and Order, p. 7.

The preclusive nature of this issue was predicated on the basis that, as the district court found, the *only* issue of toxicity was the express finding:

> [T]hat neither the [Alcan] waste emulsion nor the [Cornell] coal pile leachate contained metals in any greater concentration than the soil itself.

December 27, 1991 Memorandum-Decision and Order at 11. The allocation based on that reasoning and those express findings was affirmed by the Second Circuit in *Alcan-PAS*, 990 F.2d at 723-25.

The Remand Order as affirmed by the appellate court ignores the entire logic and fact finding of the fair share hearing and allocation scheme. The government now

proposes to change the nature of the Alcan emulsion which was the basis for the allocation, by both adding new substances and claiming that the metal concentrations were higher. Under the orders of the lower court, Cornell would be entitled to a new allocation based on this new material. Accordingly, Alcan would then be entitled to reopen discovery, as the lower courts permitted the government, in another attempt to recharacterize the Cornell waste. The Second Circuit's affirmation of the allocation formula in *Alcan-PAS* would be rendered meaningless under such circumstances.

2. This Case Was Decided On Cross-Motions For Summary Judgment Which Precludes The Lower Court And Plaintiffs From Re-Characterizing The Alcan Emulsion

Alcan's liability for response costs in this case was decided initially on cross-motions for summary judgment. *Alcan*, 775 F. Supp. at 534; *Alcan-PAS*, 990 F.2d at 717. Plaintiffs were therefore required, in response to Alcan's cross-motion, to identify the hazardous constituents of the emulsion upon which CERCLA liability and response costs could attach. The *only* hazardous substances identified by plaintiffs were metal compounds. Plaintiffs never raised the possibility of other hazardous constituents despite ample opportunity to do so, and are precluded from doing so now.

A review of the discovery conducted in this case illustrates that plaintiffs undertook extensive testing relating directly to the nature and constituents of the emulsion. In May, 1989, U.S. EPA representatives took and analyzed numerous samples of the emulsion from Alcan's Rolled Products facility in Oswego, New York. (Documented in Plaintiffs' Memorandum in Support of Motion of United States for Summary Judgment, pp. 12-18 and fn. 8; and Declaration of Kate Donnelly and David Dobb attached thereto) Based on the emulsion sample analysis, the EPA prepared a comprehensive document

entitled "Report and Data Presentation, Alcan Aluminum Corporation, Scribia, New York, Sampling of Process Waste Stream." The objective of the report, according to the EPA, was "to determine whether the oil emulsion used in Alcan's aluminum rolling process is hazardous per either RCRA or CERCLA, and to assist EPA and the Department of Justice in their current litigation against Alcan." *Id.*

The Report demonstrates that the EPA intensely investigated the possibility of other hazardous substances added to the emulsion, including volatile organic carbons ("VOCs"), and were unable to establish that any organics were added to the virgin oil[6] phase of the emulsion. In fact, the Report concluded that "the highest level of [organic] halides are found in the 'virgin oil' before it is diluted and developed into an emulsion . . ." *Id.*

The government similarly investigated the presence of PCBs in the emulsion. Extensive discovery relating to the nature and constituents of the emulsion as well as the existence of PCBs was conducted by the government. This discovery included depositions of eight (8) Alcan employees, ten (10) laboratory personnel from six (6) independent testing laboratories, and depositions of Alcan product suppliers.[7]

If the government had probative evidence demonstrating that VOCs or PCBs were added to the emulsion, it naturally follows that they would have moved for summary judgment

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[6] CERCLA expressly excludes "petroleum, including crude oil or any fraction thereof" from its definition of hazardous substance. 42 U.S.C. §9601(14).

[7] *See* Summary of the government's discovery in *Alcan-PAS* relating to the nature and constituents of Alcan's rolling oil emulsion and PCB contamination, submitted to the lower court on December 17, 1993, reprinted in the Appendix at A89-98.

based on that evidence or they would have introduced such evidence in response to Alcan's cross-motion.[8] They did not. Rather, following nearly a decade of discovery relating to the emulsion, plaintiffs moved to impose liability on Alcan based on trace metallic constituents and not on the basis of any other alleged "hazardous substance." The evidence plaintiffs are now permitted to introduce at the divisibility hearing was available and, in fact, in their possession, yet they moved for summary judgment on metals. Thus, because liability was established based on metals, a hearing on the impact of metals is all that the government is entitled to under *Alcan-PAS*.

Moreover, the issue of other hazardous constituents in the emulsion was never raised by plaintiffs even in response to Alcan's assertions that the response actions at the PAS site were attributable to PCBs and other organic materials. *Alcan-PAS*, 990 F.2d at 722. For plaintiffs to now claim and be permitted to show that the emulsion contained hazardous substances in addition to the metals is disingenuous.

Nowhere in the record before the lower courts is there any indication that other hazardous substances were at issue. The *Alcan-PAS* decision reflects that the case was remanded for one reason and one reason only--for a hearing as to whether any response costs are attributable to trace metals. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, a party responding to a summary judgment motion must assert specific facts showing that there is a genuine issue for trial or the motion will be granted:

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[8] The government, in Alcan's view, did not raise these other materials as a basis for liability (why try this case on below background metals rather than PCBs) because the evidence did not support the claim and, accordingly, they would have been unsuccessful against Alcan's cross-motion.

> When a motion for summary judgment is made . . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

F.R.C.P. 56(e). Here, plaintiffs only basis for establishing that the emulsion was hazardous and for imposing liability on Alcan was the presence of below background metal compounds. Plaintiffs failed to raise the possibility of other hazardous substances in the rolling oil emulsion in response to Alcan's cross-motion despite years of discovery. In failing to raise other grounds entitling it to judgment or in response to Alcan's cross-motions, plaintiffs waived the opportunity to pursue liability and impose response costs on Alcan based on those grounds.

In fact, absent affidavits from the government relating to environmental harm at the PAS site potentially associated with metals, the Second Circuit noted that it would have granted Alcan's cross-motion:

> [Alcan] contends that no soil contamination due to heavy metals was found there, and insists that the metallic constituents of its oil emulsion are insoluble compounds, submitting an affidavit supporting this theory of divisibility. The government submitted a declaration stating that metal contaminants like those found in Alcan's waste emulsion were present in environmental media at PAS, that the commingling of metallic and organic hazardous substances resulted in indivisible harm, and that though some forms of lead, cadmium and chromium are insoluble, they may chemically react with other substances and become water-soluble. *These differing contentions supported by expert affidavits raise sufficient questions of fact to*

preclude the granting of summary judgment on the divisibility issue.

Alcan-PAS, 990 F.2d at 722-23. (Emphasis added.)

But for the differing facts presented in accordance with Rule 56(e), no genuine issues as to harm or divisibility would remain for trial. In other words, the Second Circuit found in *Alcan-PAS* that genuine issues of material fact as to whether the metallic constituents in the emulsion were insoluble and capable of causing or contributing to environmental harm precluded summary judgment on the divisibility issue. *Id.* The only genuine issue preserved for trial and/or hearing stems from the affidavits submitted by the government relating to metals. Plaintiffs cannot and should not be permitted under the decision of the lower courts to present evidence of other hazardous substances to serve as the basis for imposing response costs on Alcan.

3. The Decision Of The Second Circuit Permits A Never Ending Stream Of Litigation Over The Same Essential Facts

The government, justifiably concerned the facts, logic and scientific principles will not preserve liability against Alcan based on below background, insoluble metal compounds, wants to retry the phase of this case which determined the nature of the emulsion in order to impose liability on Alcan based on separate and distinct grounds never raised or preserved at the summary judgment stage.

The Remand Order, as unrestricted by the appellate court, adopts the flawed reasoning of the government, which is composed of two elements. First, that the Second Circuit made "no finding that Alcan's waste did not also contain other hazardous substances, such as PCBs or volatile organic compounds (VOCs)." (Remand Order, A80) Second, that the government "only went as far as

necessary to establish liability on summary judgment." (Remand Order, A80) The problem with this logic is that, if the government is allowed to relitigate the basis for liability, then the lower courts have pronounced a doctrine that allows a party to relitigate any issue arising out of a given set of facts provided that the court, in rendering its judgment, does not negate every potential basis for liability.

In the context of this case, than, if the government had not created a dispute of fact on metals to be resolved by the lower court by interposing affidavits and as a result lost at the summary judgment stage, then the government could have initiated another lawsuit involving the same emulsion at the same site because the Second Circuit made no finding as to PCB's or VOCs. In fact, the Second Circuit made no explicit exclusions as to the entire universe of toxic materials, so presumably the government, under the lower courts' logic, could file a never-ending stream of cases focusing on each and every one of those substances one at a time. Such a conclusion defies logic and well established legal principles of *res judicata* and law of the case. *See Sea-Land Services, Inc.*, 414 U.S. 573, 578-79 (1974); *In Re: PCH Associates*, 949 F.2d 585, 594 (2d Cir. 1991). Further, neither the governments' briefs concerning the scope of remand nor the decisions of the district or appellate courts cite any case in which a court has, in order to apply the doctrine of law of the case, been required to explicitly find that the universe of potential basis for liability have been excluded, even if they were never issues raised by the parties.

The lower court decisions are not only inconsistent with the law but essentially negate the underlying policy objectives of *res judicata* and the law of the case doctrine which require parties to resolve all issues of dispute at one time and to adhere to issues previously decided. By permitting this doctrine to be continued by the trial court,

the Second Circuit is condoning trial by "harassment" where a party can be compelled into accepting responsibility for environmental harm they did not cause simply because it is less expensive than litigating the case forever.

D. The District Courts' Procedure In Handling The Alcan-Cornell Fair Share Hearing Which Was Affirmed In *Alcan-PAS* Illustrates The Merit Of Alcan's Petition For Mandamus

Alcan believes that the practical correctness of the position it is advocating by this Petition is demonstrated by the manner in which the lower court handled the Alcan-Cornell fair share hearing. Again, returning to the *Alcan* decision, the lower court stated:

> [I]nsofar as the third-party is concerned, the court grants Alcan's motion to the extent of declaring that the third-party defendant Cornell University is also liable for its fair share of response costs incurred by the government and the State of New York and accordingly denies the motion of Cornell University. *A hearing is necessary to determine the amount of the fair share.*

Alcan, 755 F.Supp. at 534. (Emphasis added.) The way in which the district court handled the third-party claim is instructive because the Cornell situation is procedurally an exact duplicate of the government-Alcan case, and because the procedure in the third-party action was affirmed by the Second Circuit.

In *Alcan-PAS*, the Second Circuit remanded for a divisibility and apportionment hearing, the same type of hearing afforded to Alcan-Cornell. Like the case involving the government, Alcan and Cornell filed cross-motions for summary judgment. The lower court granted Alcan's motion and denied the Cornell motion. The only difference between what the lower court did in the government-Alcan case and the Alcan-Cornell third-party

action was that it held a hearing on apportioned harm with respect to Cornell, and it denied Alcan that hearing with respect to plaintiffs. In all other respects the two situations are analogous.

At the fair share hearing, Alcan and Cornell presented evidence obtained through discovery consistent with the characterizations of the wastes as set forth in the *Alcan* decision, 755 F.Supp. 531. If Alcan appeared at the Cornell apportionment hearing and requested to reopen discovery in order to establish that other hazardous substances were in the Cornell waste for the purposes of apportionment, the lower court would have clearly and correctly denied that request. Discovery was closed and that matter was resolved in the liability phase. The Second Circuit affirmed the lower court's handling of the third-party action in total. *Alcan-PAS*, 990 F.2d at 723-25.

With respect to the government-Alcan portion of the case, the only issue to which the Second Circuit took exception was the failure to hold a hearing as to what, if any, response costs were assignable to Alcan based on the nature and constituents of the "hazardous substances" in the emulsion--below background metals. The Second Circuit did not reverse the finding on liability; on the contrary, over Alcan's strenuous objection, it affirmed. The Second Circuit remanded for a hearing on whether the metals caused harm and response costs.

A final point in terms of practical impact demonstrates the merit of Alcan's position. If the lower court holds a hearing on the impact of metals as required under *Alcan-PAS*, the consequence of that hearing flows automatically and logically to Cornell, since Cornell's share of liability was derived on a comparative evaluation of the two wastes as characterized for establishing liability. The Second Circuit's expectation that this would occur is indicated by their affirmation of the lower court's apportioned share of responsibility. *Alcan-PAS*, 990 F.2d at 725. If the Second

Circuit believed that liability could effectively be recharacterized, it would have vacated the lower court's apportioned liability finding with respect to Cornell, expecting the issue to be redetermined upon a recharacterization of the facts. The Second Circuit clearly did not do that in *Alcan-PAS*, yet now has failed to enforce its prior mandate.

E. Permitting The Introduction Of Additional Evidence Places Alcan In A Worse Position Than If The Lower Court Applied The Correct Divisibility Standard In Its Initial Memorandum-Decision And Order, And The Second Circuit's Failure To Correct The Lower Court Constitutes A Failure To Follow Its Own Mandate

Alcan argued in its Motion for Reconsideration of the Remand Order that, by operation of the September 12, 1994 Order, Alcan is put in a worse position on remand than it would be had the correct divisibility and apportionment standards been applied in the lower court's January 15, 1991 Memorandum-Decision and Order. Plaintiffs are asking for a retrial *ab initio* on remand, and the Second Circuit has held that the trial court must follow its express direction or otherwise it puts one of the parties in a worse position. *Slotkin v. Citizens' Casualty Co.*, 689 F.2d 154 (2d Cir. 1983). The Second Circuit refused to compel the lower court to follow the *Alcan-PAS* mandate, which amounts to a usurpation of appellate authority. The Second Circuit's decision in *Slotkin* is instructive.

In *Slotkin*, the appellants sought to proceed on a course of action on remand that was not expressly provided for by the Second Circuit. In dismissing the appellants' action, the Second Circuit noted the inappropriateness of putting a party in a worse position on remand by not following its explicit direction as to what was to occur and by working out their own scenario for retrial:

> Plaintiffs have, in fact, worked out their own scenario for their proposed retrial . . . . However, this is not the way the Second Circuit wrote the script.

Id. at 157.

Here, like the plaintiffs in *Slotkin*, the Second Circuit has allowed the government to obtain an advantage by writing their own scenario for the remand hearing. This, to use the words of the Second Circuit, was not the way the Court "wrote the script." Nor did the Second Circuit compel the lower court to comply with its mandate. The Second Circuit explicitly directed the lower court to resolve any dispute of fact concerning only the impact of below background metals. *Alcan-PAS*, 990 F.2d at 722. Indeed, the clarity of Alcan's cross-motion as being based on a determination that its emulsion contained exclusively metals is illustrated by the Second Circuit's recognition that Alcan attributed the harm at the site from substances such as PCBs to other parties. *Id.* at p. 722.

Moreover, the Second Circuit has placed Alcan in a worse position on remand than it would be if the lower court applied the correct divisibility and apportionment principles in the first instance. The hearing would have encompassed the only "hazardous substance" giving rise to liability--below background metals--and the case would have been resolved under the same logic and reasoning as the Alcan-Cornell third-party claim. The Second Circuit ordered a divisibility hearing based on metals and Alcan's cross-motion.

Alcan's cross-motion was predicated on the undisputed assertion that the only hazardous substances in the emulsion were insoluble metal compounds and, therefore, it could not be held responsible for the problems created by materials other than the metals. This case was remanded to the lower court for the resolution of that dispute and that dispute alone. Under

the *Alcan-PAS* mandate, the lower court is only permitted to resolve the only issues preserved which relate to harm, if any, associated with trace metals and apportionment of damages.

Damages, if any, should be determined based on liability as initially found. It would be fundamentally unfair and contrary to the *Alcan-PAS* mandate to allow damages to be imposed for alleged harm which was not the basis for liability in the first instance. Accordingly, Alcan requests that this Honorable Court grant this Petition for Writ of Mandamus to confine the inferior court to a lawful exercise of its prescribed jurisdiction, and to compel the Second Circuit to enforce the *Alcan-PAS* mandate.

CONCLUSION

For the foregoing reasons, Petitioner Alcan Aluminum Corporation respectfully requests that this Honorable Court issue an Order (a) vacating the May 15, 1995 Order of the Second Circuit, (b) directing the Second Circuit to order the lower court to vacate the September and December, 1994 Remand Orders, and (c) order the Second Circuit to compel the lower court to conduct a divisibility hearing relating to harm, if any, associated with below background metals and apportion damages accordingly, consistent with the *Alcan-PAS* mandate.

Respectfully submitted,

Lawrence A. Salibra, II
Counsel of Record
John C. Tillman
Alcan Aluminum Corporation
100 Erieview Plaza, 17th Flr.
Cleveland, Ohio 44114
(216) 523-6918
Attorneys for Petitioner Alcan Aluminum Corporation

APPENDIX

UNITED STATES OF AMERICA
State of New York,
Plaintiffs-Appellees,

v.

ALCAN ALUMINUM CORPORATION,
Defendant-Third-Party-Plaintiff
Appellee-Cross-Appellant,

v.

CORNELL UNIVERSITY,
Third-Party-Defendant
Appellant-Cross-Appellee.

Nos. 403, 530, Dockets 92-6158, 92-6160.

United States Court of Appeals,
Second Circuit.

Argued Nov. 9, 1992.

Decided April 6, 1993.

United States and state of New York filed CERCLA action against company which disposed of hazardous wastes at contaminated site. Company filed third-party complaint against university which disposed of neutralized runoff water from coal fire at site seeking contribution. United States District Court for the Northern District of New York, Thomas J. McAvoy, J., 755 F.Supp. 531, granted summary judgment in favor of United States and State of New

York holding company jointly and severally liable for cleanup of site and allowing company to obtain contribution from university under CERCLA. Company and university appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) Northern District of New York was entitled to enter final judgment based on its earlier liability ruling and was not obliged to give estoppel effect to any rulings entered in Pennsylvania district courts after date of its ruling; (2) CERCLA does not impose quantitative requirements with respect to hazardous substances; (3) reportable quantities of substances (RQs) and chemical abstracts service registry numbers (CASRNs) did not address issue of CERCLA liability; and (4) choice as to when to address divisibility and apportionment issues were questions best left to sound discretion of trial court in handling of individual case.

Affirmed in part; reversed in part and remanded.

[1] JUDGMENT k540

Res judicata, or claim preclusion, means simply that when judgment is rendered on merits, it bars second suit between same parties or their privies based on same cause of action or claims.

[2] JUDGMENT k720

Under collateral estoppel, or issue preclusion, second suit is upon different claim or cause of action, and doctrine's fundamental notion is that issue of fact or law actually litigated and decided by court of competent jurisdiction in prior action may not be relitigated in subsequent suit between same parties or their privies.

[3] JUDGMENT k634

Collateral estoppel saves parties and courts from waste and burden of relitigating stale issues and, by discouraging inconsistent results, forwards public policy favoring establishment of certainty in legal relations.

[4] JUDGMENT k739

Court should decline to give preclusive effect to prior judgment if there have been changes either in applicable legal rules or factual predicates essential to that prior judgment.

[5] JUDGMENT k634

Where pure questions of law, unmixed with any particular set of facts, are presented to court, interests of finality and judicial economy may be outweighed by other substantive policies.

[6] JUDGMENT k650

Liability ruling made by New York federal district court granting summary judgment for government against polluter in CERCLA action and for polluter against university on contribution claim was sufficiently final to be entitled to estoppel effect in Pennsylvania federal district court, even though, by time New York district court entered final judgment, Pennsylvania district court had made its rulings in another CERCLA action against same polluter in reliance on New York district court's ruling and Third Circuit had affirmed those rulings in part and remanded on issue of divisibility; New York district court was entitled to enter final judgment based on its earlier liability ruling and was not obliged to give

estoppel effect to any rulings entered in Pennsylvania district court after date of its ruling.

[7] HEALTH AND ENVIRONMENT k25.5(5.5)

In bringing action under CERCLA, government must establish that: defendant is one of four categories of covered persons listed in CERCLA as liable for costs of remedial action; site of cleanup is "facility" under CERCLA; there is release or threatened release of hazardous substances at facility; as result of release or threatened release, government has incurred response costs; and costs incurred conform to national contingency plan as administered by Environmental Protection Agency (EPA). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(9), 107(a)(4)(A), (b), as amended, 42 U.S.C.A. §§ 9601(9), 9607(a)(4)(A), (b).

[8] FEDERAL CIVIL PROCEDURE k2481

If government establishes in CERCLA action each element on undisputed facts, and defendant is unable to demonstrate by preponderance of evidence existence of one of three affirmative defenses set forth in CERCLA, then government is entitled to summary judgment on issue of liability, even when genuine issues of material fact remain as to appropriate damages. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(9), 107(a)(4)(A), (b), as amended, 42 U.S.C.A. §§ 9601(9), 9607(a)(4)(A), (b).

[9] HEALTH AND ENVIRONMENT k25.5(5.5)

Liability under CERCLA may be decided first before more complicated questions implicated in cleanup measures, which includes fixing proportionate fault of liable parties. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(9), 107(a)(4)(A), (b), as amended, 42 U.S.C.A. §§ 9601(9), 9607(a)(4)(A), (b).

[10] FEDERAL CIVIL PROCEDURE k1954.1, 2481

Bifurcation and summary judgment provide powerful legal tools which, by effectively isolating issues to be resolved, avoid lengthy and perhaps needless litigation in CERCLA actions; existence of those procedural tools aids Congress' purposes of encouraging settlement discussion and speeding up remedial action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(9), 107(a)(4)(A), (b), as amended, 42 U.S.C.A. §§ 9601(9), 9607(a)(4)(A), (b).

[11] HEALTH AND ENVIRONMENT k25.5(5.5)

CERCLA, on its face, applies to any "hazardous substance," and does not impose quantitative requirements. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, as amended, 42 U.S.C.A. §§ 9601(14), 9602; Solid Waste Disposal Act, § 3001, as amended, 42 U.S.C.A. § 6921; Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), § 307(A), 33 U.S.C.A. § 1317(A); Clean Air Act, § 112, 42 U.S.C.A. § 7412.

See publication Words and Phrases for other judicial constructions and definitions.

[12] HEALTH AND ENVIRONMENT k25.5(5.5)

"Hazardous substance," under CERCLA, includes even minimal amounts of pollution. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, as amended, 42 U.S.C.A. §§ 9601(14), 9602; Solid Waste Disposal Act, § 3001, as amended, 42 U.S.C.A. § 6921; Federal Water Pollution Control Act Amendments of 1972 § 307(A), 33 U.S.C.A. § 1317(A); Clean Air Act, § 112, 42 U.S.C.A. § 7412

[13] HEALTH AND ENVIRONMENT k25.5(5.5)

Specific reportable quantities (RQs) of substances and chemical abstracts service registry numbers (CASRNs) designated by Environmental Protection Agency (EPA) for certain hazardous substances go only to reporting requirements, and do not address issue of CERCLA liability. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 102(a), as amended, 42 U.S.C.A. § 9602(a).

[14] HEALTH AND ENVIRONMENT k25.5(5.5)

To impose strict liability under CERCLA, government need only prove: (1) there was release or threatened release, (2) which caused incurrence of response costs, and that (3) defendant generated hazardous waste at cleanup site; government is not required to show that specific defendant's waste caused incurrence of cleanup costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 102(a), as amended, 42 U.S.C.A. § 9602(a).

[15] HEALTH AND ENVIRONMENT k25.5(5.5)

There are only three defenses to imposition of CERCLA liability on generator of hazardous waste: act of God, act of war, and act or omission of third party. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a, b), (a)(3, 4), as amended, 42 U.S.C.A. § 9607(a, b), (a)(3, 4).

[16] HEALTH AND ENVIRONMENT k25.5(5.5)

In addition to imposing strict liability scheme, CERCLA does away with causation requirement. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a, b), as amended, 42 U.S.C.A. § 9607(a, b).

[17] FEDERAL CIVIL PROCEDURE k2481

Genuine issue of material fact as to whether metallic constituents of polluter's oil emulsions were insoluble or soluble compounds, given conflicting expert affidavits, precluded summary judgment for government on divisibility issue in CERCLA action against polluter. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[18] TORTS k22

Where two or more joint tort-feasors act independently and cause distinct or single harm, for which there is reasonable basis for division according to contribution of each, then each is liable for damages only for its own portion of harm; but where each tort-feasor causes single indivisible harm, the damages are not apportioned and each is liable for damages for entire harm.

[19] HEALTH AND ENVIRONMENT k25.5(5.5)

Under common law, polluter could escape any liability for response costs under CERCLA if it succeeded in proving that its oil emulsion, when mixed with other hazardous waste, either did not contribute to release and cleanup costs that followed, or contributed at most to only divisible portion of harm. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[20] HEALTH AND ENVIRONMENT k25.5(5.5)

Polluter bears ultimate burden of establishing reasonable basis for apportioning liability for response costs in CERCLA action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[21] HEALTH AND ENVIRONMENT k25.5(5.5)

Government has no burden of proof with respect to what caused release of hazardous waste and triggered response costs in action under CERCLA; it is defendant that bears that burden. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[22] FEDERAL CIVIL PROCEDURE k2481

To defeat government's motion for summary judgment in CERCLA action on issue of divisibility of harm, polluter need only show that there are genuine issues of material fact regarding reasonable basis for apportionment of liability. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[23] HEALTH AND ENVIRONMENT k25.5(5.5)

Apportionment of liability is intensely factual determination in CERCLA action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[24] HEALTH AND ENVIRONMENT k25.5(5.5)

Causation, with burden on defendant, is reintroduced at apportionment stage in CERCLA action only to permit defendant to escape payment where its pollutants did not contribute more than background contamination and also cannot concentrate; this special exception to usual absence of causation requirement is applicable only to claims where background levels are not exceeded and limited exception will be recognized only in absence of any Environmental Protection Agency (EPA) thresholds. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, ss 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b).

[25] HEALTH AND ENVIRONMENT k25.5(5.5)

Commingling of metallic and organic hazardous substances was not synonymous with indivisible harm, and polluter was entitled to opportunity to show that harm caused at contaminated site was capable of reasonable apportionment; polluter could present evidence relevant to establishing divisibility of harm, such as, proof disclosing relative toxicity, migratory potential, degree of migration, and synergistic capacities of hazardous substances at site. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102, 107(a), (a)(3), (b), as amended, 42 U.S.C.A. §§ 9601(14), 9602, 9607(a), (a)(3), (b); Solid Waste Disposal Act, § 3001, as amended, 42 U.S.C.A. § 6921; Federal Water Pollution Control Act Amendments of 1972, § 307(A), 33 U.S.C.A. § 1317(A); Clean Air Act, § 112, 42 U.S.C.A. § 7412.

[26] HEALTH AND ENVIRONMENT k25.5(5.5)

Although language of CERCLA and Superfund Amendments and Reauthorization Act (SARA) in their legislative histories appeared to demonstrate that liability should be fixed first and immediately for enforcement purposes and litigation should be conducted later to sort out what contribution is owed and by whom as result of remediation effort, choice as to when to address divisibility and apportionment are questions best left to sound discretion of trial court in handling of individual case. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107(a, b), 113(f)(1), as amended, 42 U.S.C.A. §§ 9607(a, b), 9613(f)(1)

[27] HEALTH AND ENVIRONMENT k25.5(5.5)

University which sent 551,000 gallons of neutralized runoff water to contaminated site following fire in stock pile of coal on campus was "potentially liable" party under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 107, 107(a), (a)(3), 113(f)(1), as amended, 42 U.S.C.A. §§ 9607, 9607(a), (a)(3), 9613(f)(1).

See publication Words and Phrases for other judicial constructions and definitions.

[28] CONTRIBUTION k5(6.1)

Federal common-law principles in effect prior to Superfund Amendments (SARA) to CERCLA rendered university liable for contribution to cleanup costs of contaminated site due to its disposal at site of neutralized runoff water following fire in stock pile of coal on campus, and court was not required to apply Superfund Amendments retroactively in order to hold university liable for contribution. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 113, 113(f), (f)(2), as amended, 42 U.S.C.A. §§ 9613, 9613(f), (f)(2).

[29] STATUTES k263

There is strong presumption against retroactive application of statute.

[30] STATUTES k263

No law should be construed retrospectively unless Congress' purpose can be satisfied in no other way or unless statutory language admits of no other meaning.

[31] STATUTES k263

Court should apply law existing at time of its decision unless to do so is contrary to plain meaning of statute or would cause manifest injustice.

[32] COMPROMISE AND SETTLEMENT k3

Negotiations between Environmental Protection Agency (EPA) and university which resulted in university being removed from list of those potentially responsible parties for cleanup of contaminated site did not amount to "administrative settlement," for purposes of CERCLA, so as to preclude university's liability for contribution for cleanup of site at which it disposed of neutralized runoff water following fire in stockpile of coal on campus, where procedural steps necessary to effectuate settlement under CERCLA were not followed. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 113, 113(f), (f)(2), 122, 122(g)(4), (i)(1), as amended, 42 U.S.C.A. §§ 9613, 9613(f), (f)(2), 9622, 9622(g)(4), (i)(1).

See publication Words and Phrases for other judicial constructions and definitions

[33] COMPROMISE AND SETTLEMENT k5(1)

Only when settlement procedures set forth in CERCLA are followed, including publishing notice of such in Federal Register and obtaining prior written approval of settlement by Attorney General, is party shielded from contribution claim under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 113, 113(f), (f)(2), 122, 122(g)(4), (i)(1), as amended, 42 U.S.C.A. §§ 9613, 9613(f), (f)(2), 9622, 9622(g)(4), (i)(1).

[34] CONTRIBUTION k5(6.1)

University which disposed of neutralized runoff water at contaminated site following fire in stockpile of coal on campus was not insulated from requirement to contribute in CERCLA action under federal common law due to its removal by Environmental Protection Agency (EPA) from list of potentially responsible parties, where EPA merely advised university that it was removing university from list and EPA and university did not enter into release, covenant not to sue, or any other similar, legally binding agreement. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104(a)(3), 107(a), 113(f)(1), 122, 122(g)(4), (i)(1), as amended, 42 U.S.C.A. §§ 9604(a)(3), 9607(a), 9613(f)(1), 9622, 9622(g)(4), (i)(1).

Lawrence A. Salibra, II, Cleveland, OH (John C. Tillman, of counsel), for defendant third party plaintiff appellee cross appellant Alcan Aluminum Corp.

Thomas Mead Santoro, Ithaca, NY (Patricia A. McClary, on the brief), for third party defendant appellant cross appellee Cornell University.

John T. Stahr, Washington, DC (Anne S. Almy, Henry Friedman, Dept. of Justice, Environment and Natural Resources Division, Bernice Corman, Carol Berns, Joan Gillespie, Charles De Saillan, Charles Breece, U.S. E.P.A., David A. Munro, Asst. Atty. Gen., Vicki A. O'Meara, Acting Asst. Atty. Gen., State of New York, of counsel), for plaintiffs-appellees U.S., State of NY.

O. Peter Sherwood, Corp. Counsel, New York City (Peter H. Lehner, Christopher A. Amato, Environmental Law Div., of counsel), filed a brief on behalf of the City of New York as amicus curiae.

Norman W. Bernstein, Washington, DC (Donald B. Mitchell, Jr., Lawrence E. Blatnik, Arent Fox Kintner Plotkin & Kahn, of counsel), filed a brief on behalf of Exxon Chemical Co., Ford Motor Co., Allied-Signal, Inc., Carrier Corp., General Motors Corp., Pratt & Whitney, and USX Corp. as amicus curiae. Robert B. Weintraub, New York City (Michael Stanley, Oswego, NY, of counsel), filed a brief on behalf of the Greater Oswego Chamber of Commerce, Inc. as amicus curiae.

Robert B. Weintraub, New York City (Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, DC, of counsel), filed a brief on behalf of the Chamber of Commerce of the U.S. of America as amicus curiae.

Robert B. Weintraub, New York City, filed a brief on behalf of New York State Ins. Ass'n as amicus curiae.

Austin V. Campriello, Werner & Kennedy, New York City (Mahlon C. Schneider, Austin, MN, Kevin Montano, Bethesda, MD, of counsel), filed a brief on behalf of Geo. A. Hormel & Co., Marriott Corporation's Food Service Div., The National Food Processors Ass'n and Burger King Corp. as amici curiae.

Doren P. Norfleet, Oswego, NY, filed a brief on behalf of Operation Oswego County, Inc. as amicus curiae.

Thomas O'Brien, Jeffrey & O'Brien, P.C., Clinton, NY, filed a brief on behalf of Various Individuals Who Represent a Cross-Section of the Metropolitan Area of Utica, New York as amicus curiae.

James R. Griffith, Felt, Hubbard & Bogan, Utica, NY, filed a brief on behalf of New York State Conference of Mayors and Mun. Officials as amicus curiae.

Alan S. Burstein, Scolaro, Shulman, Cohen, Lawler & Burstein, P.C., Syracuse, NY, filed a brief on behalf of School Districts as amici curiae.

Robert B. Weintraub, New York City (Gay Williams, Sullivan & Williams, Oswego, NY, of counsel), filed a brief on behalf of City of Oswego as amicus curiae.

Robert B. Weintraub, New York City (Bruce N. Clark, Oswego, NY, of counsel), filed a brief on behalf of County of Oswego as amicus curiae.

Before NEWMAN, CARDAMONE, and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

Alcan Aluminum Corporation (Alcan) and Cornell University appeal from an order of the United States

District Court for the Northern District of New York, (McAvoy, J.), granting summary judgment in favor of appellees, United States and New York State, holding Alcan jointly and severally liable for cleanup of a hazardous waste site, and allowing Alcan to obtain contribution from Cornell. *United States v. Alcan Aluminum Corp.*, 755 F.Supp. 531 (N.D.N.Y.1991).

Alcan and a host of amicus briefs have presented us with a parade of horribles predicated on their view that under the district court opinion, hazardous substances include breakfast cereal, the soil, and nearly everything else upon which life depends, and that such an approach will make liable for response costs the butcher, the baker and the candlestick maker. They posit that to avoid such an absurd result, liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (1988, Supp. I 1989 & Supp. II 1990), should not be imposed unless a responsible party has contributed some minimum concentration of a hazardous element or compound.

Admittedly, there is some force to this argument; yet, the government's response is also compelling. It notes that were we to limit liability in the manner Alcan and *amici* suggest, each potential defendant in a multi-defendant CERCLA case would be able to escape liability simply by relying on the low concentration of hazardous substances in its wastes, and the government would be left to absorb the clean-up costs. Several courts have already held such was not the aim of Congress

In passing CERCLA Congress faced the unenviable choice of enacting a legislative scheme that would be somewhat unfair to generators of hazardous substances or one that would unfairly burden the taxpaying public. The financial burdens of toxic clean-up had been vastly underestimated--in 1980 when CERCLA was enacted $1.8 billion was thought to be enough. In 1986 when the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. No. 99-499, 100 Stat. 1613 (1986), was passed, $100 billion was held to be needed. It may well be more today. It is of course the public-at-large that is already bearing the economic brunt of this enormous national problem. There may be unfairness in the legislative plan, but we think Congress imposed responsibility on generators of hazardous substances advisedly. And, even were it not advisedly, we still must take this statute as it is.

Having assessed CERCLA's plain meaning, its legislative history, and the case law construing it, we think the tension may be resolved by allowing a responsible party, like Alcan, to pay nothing if it can demonstrate that its pollutants, when mixed with other hazardous wastes, did not contribute to the release or the resulting response costs. In this respect we essentially adopt the Third Circuit's reasoning in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267-71 (3d Cir.1992) (*Alcan-Butler*). This approach is not intended to provide an escape hatch for CERCLA defendants; rather, it will permit such a defendant to avoid liability only when its pollutants contribute no more than background contamination.

BACKGROUND

A. *Facts*

From 1970 to 1977 Pollution Abatement Services (PAS) operated a waste disposal and treatment center on 15 acres of land in Oswego County, New York. The PAS facility there stored, processed, and disposed of chemical wastes from a number of sources; as a result the site became contaminated with hazardous substances. In 1977 the Environmental Protection Agency (EPA) and New York State undertook response and clean-up measures and spent over $12 million in the ensuing ten years on remedial actions.

Alcan used PAS during the 1970s and arranged for disposal or treatment there of 4.6 million gallons of oil emulsion. This emulsion--used in Alcan's manufacturing process--consisted mostly of water and mineral oil, along with small aluminum ingot shavings containing lead, copper, chromium, zinc, and cadmium compounds.

In 1974, a stock-pile of coal caught fire at Cornell University's Ithaca, New York campus. The local fire department extinguished it with water, and some of the run-off from the coal pile flowed into area streams. After consultation with New York environmental officials, Cornell collected this coal run-off water and neutralized it. For two years following the fire, Cornell sent 551,000 gallons of the neutralized run-off water to the Oswego PAS site. When in 1983 Cornell was notified of hazardous waste problems at the PAS site, it explained to the EPA what waste it had sent there for disposal. In March

1986 Cornell purportedly resolved any question of its liability with the EPA, which thereupon removed the University from its list of those parties potentially responsible for response costs at PAS.

B. *Present Suit*

Ten years after the 1977 commencement of clean-up efforts, in 1987 the United States and New York (collectively the government) brought a CERCLA s 107(a), 42 U.S.C. s 9607(a), action to recover response costs against 83 of the parties potentially responsible for the environmental problems at the Oswego site. The government entered into a consent decree with 82 of these defendants, recovering 74 percent or $9.1 million of the clean-up costs it had incurred. Alcan was the lone holdout. The government sued it for the $3.2 million of unrecovered costs. In 1988 Alcan served a third-party complaint against Cornell seeking contribution from it for a share of the clean-up costs.

After discovery had been completed, the government moved for summary judgment against Alcan contending that Alcan's disposal of hazardous substances at PAS had been conceded. Alcan cross-moved for summary judgment against the United States and New York State, asserting principally that CERCLA's definition of "hazardous substance" requires a minimum concentration level of specific compounds and that under the statute causation needed to be demonstrated. Alcan also asserted that the harm caused by its waste was divisible and that the government claim improperly subjected it to joint and several liability. Alcan also

moved for summary judgment against Cornell University, as a third-party defendant, and Cornell cross-moved in turn for summary judgment against Alcan.

The district court granted summary judgment for the government against Alcan, and for Alcan against Cornell on January 15, 1991. It rejected Alcan's arguments concerning minimum concentration requirements and causation. It further held Alcan had failed to meet its burden to show that the harm at PAS was divisible, and awarded the government approximately $4 million in accumulated response costs. With respect to Cornell, the district court stated that the University was responsible to Alcan for its "fair share" of the clean-up costs and refused to shield the university from liability on the basis of its removal by the EPA from the list of potentially responsible parties. *See* 755 F.Supp. at 543-45.

On November 19 and 20, 1991 the trial court held a "fair share" hearing to determine the extent of Cornell's liability to Alcan. Adopting a six-factor fair share allocation test from *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir.1991), it ruled Cornell was responsible for six percent of the response cost recovered by the government from Alcan and therefore awarded Alcan $310,540.92. The final judgment against Alcan was more than $5 million, due to additional clean-up costs and prejudgment interest. Alcan and Cornell appeal from an amended final judgment of the district court entered May 29, 1992, and Cornell also appeals from its January 15, 1991 order.

DISCUSSION

I Collateral Estoppel

Before considering the merits of the appeal, it is necessary to rule on a collateral estoppel argument raised by the government against Alcan's appeal arising from similar litigation the government brought in Pennsylvania against Alcan.

A. *The Alcan-Butler Litigation*

In November 1989--two years after the institution of the instant litigation--the United States brought an identical cause of action against Alcan under the same provision, CERCLA § 107(a), to recover costs incurred in the clean-up of Butler Tunnel, a waste disposal facility located on the banks of the Susquehanna River in Pennsylvania. The United States District Court for the Middle District of Pennsylvania on May 8, 1991 granted the United States' motion for summary judgment against Alcan, relying entirely on the reasons set forth in Judge McAvoy's decision handed down on January 15, 1991 in the case we are now reviewing.

Alcan appealed to the Third Circuit arguing that (1) CERCLA contains a minimum quantitative requirement for "hazardous substance," (2) Alcan's emulsion falls within CERCLA's petroleum exception, (3) the decision of the District Court for the Middle District of Pennsylvania is inconsistent with EPA regulations under CERCLA, (4) CERCLA requires a specific causal relationship, and (5) CERCLA fails to give fair notice of what is considered a hazardous substance to potential defendants. On May 14, 1992

the Third Circuit rejected each of these arguments. *See Alcan-Butler*, 964 F.2d at 259-67. But it vacated the Middle District Court's judgment and remanded the case to that court for a hearing on divisibility. *Id.* at 271. Rehearing *in banc* was denied in July 1992. *See id.*

The government now insists that Alcan has presented to us the precise issues that were raised, litigated, and decided against it in *Alcan-Butler*. To make its point, it itemizes the arguments in Alcan's brief before us and demonstrates that they mirror the recited issues addressed in *Alcan-Butler*.

B. *Collateral Estoppel No Bar*

[1-3] We analyze the collateral estoppel doctrine as it pertains to this appeal. *Res judicata*, or claim preclusion, means simply that when a judgment is rendered on the merits, it bars a second suit between the same parties or their privies based on the same cause of action or claims. *See* 1B *J.W. Moore, Moore's Federal Practice* ¶ 0.405[1] (2d ed. 1992). Under collateral estoppel, or issue preclusion, the second suit is upon a different claim or cause of action. This doctrine's fundamental notion is that an *issue of law or fact* actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies, *see Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). Collateral estoppel saves parties and the courts from the waste and burden of relitigating stale issues, *see* 1B Moore, *supra* ¶ 0.441[2], and, by discouraging inconsistent results, forwards public

policy favoring the establishment of certainty in legal relations. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 176-77, 104 S.Ct. 575, 581-82, 78 L.Ed.2d 388 (1984) (White, J., concurring in result); *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980).

[4, 5] There are exceptions to the use of collateral estoppel. For example, a court should decline to give preclusive effect to a prior judgment if there have been changes either in the applicable legal rules or the factual predicates essential to that prior judgment. *See Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1356 (2d Cir.), *cert. granted*, --- U.S. ----, 113 S.Ct. 52, 121 L.Ed.2d 22 (1992). In addition, where pure questions of law--unmixed with any particular set of facts--are presented to a court, the "interests of finality and judicial economy may be outweighed by other substantive policies." *Id.; accord* 18 Charles A. Wright et al., *Federal Practice & Procedure* § 4425 (1981 & Supp.1992). The government insists the various recognized exceptions to the use of collateral estoppel are inapplicable, while Alcan attempts to bring itself within one or more of these exclusions to the estoppel doctrine.

[6] The issue posed is whether the Pennsylvania courts should have given estoppel effect to the rulings of the Northern District or whether the Northern District should have given estoppel effect to the rulings of the Pennsylvania courts. The matter is complicated by the procedural facts. The Northern District's ruling of January 15, 1991 preceded any of the Pennsylvania rulings. But by the time the Northern District entered a final judgment, the

Pennsylvania district court had made its rulings and the Third Circuit had affirmed those rulings in part and remanded on the issue of divisibility. We have taken a broad view of the application of collateral estoppel to rulings made at an interim stage of litigation. Estoppel is applied when "the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir.1961), *cert. denied*, 368 U.S. 986, 82 S.Ct. 601, 7 L.Ed.2d 524 (1962); *accord Sherman v. Jacobson*, 247 F.Supp. 261, 268 (S.D.N.Y.1965); *see also Stauffer Chem.*, 464 U.S. at 180, 104 S.Ct. at 583 (White, J., concurring in result) (estoppel is a "flexible, judge-made doctrine").

In this case, we are satisfied that the liability ruling made by the Northern District was sufficiently final to be entitled to estoppel effect. Of course, it is not up to us to determine whether the district court of another circuit was obliged to give such effect to the Northern District ruling. We have no authority to review the rulings of the Pennsylvania district court. We are nonetheless entitled to decide that we think the Northern District's ruling deserves preclusive effect and, that being so, it follows, at least for purposes of litigation in this Circuit, that the Northern District was entitled to enter a final judgment based on its earlier liability ruling and was not obliged to give estoppel effect to any rulings entered in the Pennsylvania courts after the date of its January 15, 1991 ruling. *Cf. Laaman v. United States*, 973 F.2d 107, 112-13 (2d Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993).

II Liability Under CERCLA

A. Chronology

[7][8] Before entering upon an analysis of the merits of this appeal it will be helpful to set forth an overview of CERCLA. In bringing an action under this Act, the government must establish that: (1) defendant is one of the four categories of covered persons listed under § 9607(a) as liable for the costs of remedial action, (2) the site of the clean-up is a facility under § 9601(9), (3) there is a release or threatened release of hazardous substances at the facility, (4) as a result of which plaintiff has incurred response costs, and (5) the costs incurred conform to the national contingency plan under § 9607(a)(4)(A) as administered by the EPA. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir.1992). If the government establishes each of these elements on undisputed facts, and the defendant is unable to demonstrate by a preponderance of the evidence the existence of one of the three affirmative defenses set forth in § 9607(b), then plaintiff is entitled to summary judgment on the issue of liability, even when genuine issues of material fact remain as to appropriate damages. *See Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989).

[9, 10] Liability may be decided first *before* the more complicated questions implicated in clean-up measures, which includes fixing the proportionate fault of liable parties. *Id.* at 667. Bifurcation and summary judgment provide powerful legal tools which, by effectively isolating the issues to be resolved, avoid

lengthy and perhaps needless litigation. The existence of those procedural tools aids Congress' purpose by encouraging settlement discussions and speeding up remedial action. *See id.* at 668.

B. Liability Issues

Alcan attempts to interpose a number of additional defenses to prevent the imposition of liability. It argues that a polluter should not be held liable unless: a) the concentration of hazardous substances in its wastes exceeds some minimum threshold; b) its wastes fall within certain EPA reporting requirements; and c) its wastes caused the government to incur response costs. Under the present reading of CERCLA none of these issues may be considered in imposing liability.

1. Quantitative Thresholds for Hazardous Substances

[11] CERCLA § 9601(14) defines "hazardous substance" by cross-referencing several other environmental statutes. The term includes: "(A) *any* substance" designated under the Clean Water Act, "(B) *any* element, compound, mixture, solution, or substance" under CERCLA § 9602, "(C) *any* hazardous waste" listed in § 3001 of the Solid Waste Disposal Act, "(D) *any* toxic pollutant" listed in § 307(A) of the Clean Water Act, "(E) *any* hazardous air pollutant listed under" § 112 of the Clean Air Act, and "(F) *any* imminently hazardous chemical substance or mixture" with respect to which the EPA has taken action. 42 U.S.C. § 9601(14) (emphasis added). The statute on its face applies to "any" hazardous substance, and it does not impose quantitative requirements.

[12] The breadth of § 9601(14) cannot be easily escaped, and we have expressly held that "[q]uantity or concentration is not a factor." *Murtha*, 958 F.2d at 1200; *accord Alcan-Butler*, 964 F.2d at 259-61. We have also reasoned that "when Congress wanted to draw distinctions based on concentration or quantity, it expressly provided as much." *Murtha*, 958 F.2d at 1200; *accord Alcan-Butler*, 964 F.2d at 261 (same). The absence of such quantity requirements in CERCLA leads inevitably to the conclusion that Congress planned for the "hazardous substance" definition to include even minimal amounts of pollution. *See Eagle-Picher Indus., Inc. v. United States E.P.A.*, 759 F.2d 922, 927-28 (D.C.Cir.1985).

2. EPA Definition of Hazardous Substances under CERCLA

[13] Pursuant to § 9602(a), the EPA has designated certain substances as hazardous in 40 C.F.R. § 302.4 (1992) and the accompanying table. This regulation sets out broad headings of elements, within which are established specific reportable quantities ("RQs") of substances and chemical abstracts service registry numbers ("CASRNs"). Alcan admits that the elements in its oil emulsion fall within the broad categories listed by the EPA, but it notes that these elements are not given RQs and CASRNs. Thus, it argues that these elements should not be classified as hazardous under CERCLA, as all hazardous elements must have RQs and CASRNs. According to Alcan, a contrary interpretation renders the EPA regulation meaningless.

We need not dwell long on this argument. Besides the district court in this case, *see Alcan*, 755 F.Supp. at 538, two other courts have assessed and rejected this proposition. *See Alcan-Butler*, 964 F.2d at 262-63; *City of New York v. Exxon Corp.*, 766 F.Supp. 177, 181-83 (S.D.N.Y.1991) (also involving Alcan). Each of these courts has essentially determined that the RQs and CASRNs are irrelevant for CERCLA liability purposes. The EPA draws a vital distinction that makes this plain: RQs and CASRNs only go to reporting requirements, they do not address the issue of CERCLA liability. *See Exxon*, 766 F.Supp. at 182-83 (citing and quoting EPA interpretation in 50 Fed.Reg. 13,456, 13,461, 13,472-73 (April 5, 1985)). We believe this reasoning correct and therefore adopt it.

3. Causation under CERCLA

[14] CERCLA § 9607(a) imposes strict liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment" of hazardous substances "from which there is a release, or a threatened release which causes the incurrence of response costs." § 9607(a)(3) and (4). The plain meaning of this language dictates that the government need only prove: (1) there was a release or threatened release, which (2) caused incurrence of response costs, and (3) that the defendant generated hazardous waste at the clean-up site. What is not required is that the government show that a specific defendant's waste caused incurrence of clean-up costs.

[15][16] As earlier noted, there are "only" three defenses to imposition of liability on a generator: an act of God, an act of war, and an act or omission of a third party. 42 U.S.C. § 9607(b). In *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir.1985), we held that the owner of a facility was liable under CERCLA without a finding of causation of the release because "including a causation requirement makes superfluous the affirmative defenses provided in section 9607(b)." *Id.* Our reading drew additional support from CERCLA's legislative history, from which we concluded that "Congress specifically rejected including a causation requirement" in this section. *Id.* Other circuits have reached the same conclusion. *See Alcan-Butler,* 964 F.2d at 265; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152-54 (1st Cir.1989); *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). Hence, it seems plain that in addition to imposing a strict liability scheme, CERCLA does away with a causation requirement.

Alcan argues to the contrary, primarily relying upon the Fifth Circuit's decision in *Amoco Oil Co.*, 889 F.2d at 670, which it interprets as establishing a causal nexus requirement. Alcan further presses that in order for a causal connection to exist, there must be levels of hazardous substance above ambient or background. The Third Circuit assessed and rejected this assertion, noting that the Fifth Circuit did not hold that the factual inquiry concerning whether a release has caused response costs would implicate whether an alleged polluter's waste caused response costs. *Alcan-Butler,* 964 F.2d at 266. We agree with the Third Circuit that *Amoco Oil* is distinguishable.

III Divisibility

A. General Principles

[17][18] Having rejected Alcan's proffered defenses to liability, one would suppose there is no limit to the scope of CERCLA liability. To avoid such a harsh result courts have added a common law gloss onto the statutory framework. They have at once adopted a scheme of joint and several liability but at the same time have limited somewhat the availability of such liability against multiple defendants charged with adding hazardous substances to a Superfund site. *See, e.g., O'Neil v. Picillo,* 883 F.2d 176, 178-79 (1st Cir.1989), *cert. denied*, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *United States v. Chem-Dyne Corp.,* 572 F.Supp. 802, 808 (S.D.Ohio 1983). The Restatement (Second) of Torts § 433A (1965) has been relied upon in determining whether a party should be held jointly and severally liable, for the entire cost of remediating environmental harm at the site. *See, e.g., Alcan-Butler,* 964 F.2d at 268-69; *O'Neil,* 883 F.2d at 178; *Monsanto,* 858 F.2d at 171-73; *see also United States v. R.W. Meyer,* 889 F.2d 1497, 1506-08 (6th Cir.1989). Under § 433A of the Restatement where two or more joint tortfeasors act independently and cause a distinct or single harm, for which there is a reasonable basis for division according to the contribution of each, then each is liable for damages only for its own portion of the harm. In other words, the damages are apportioned. But where each tortfeasor causes a single indivisible harm, then damages are not apportioned and each is liable in damages for the entire harm.

[19-23] Based on these common law principles, Alcan may escape any liability for response costs if it either succeeds in proving that its oil emulsion, when mixed with other hazardous wastes, did not contribute to the release and the clean-up costs that followed, or contributed at most to only a divisible portion of the harm. *See Alcan-Butler,* 964 F.2d at 270. Alcan as the polluter bears the ultimate burden of establishing a reasonable basis for apportioning liability. *See Monsanto,* 858 F.2d at 172; *Chem-Dyne,* 572 F.Supp. at 810. The government has no burden of proof with respect to what caused the release of hazardous waste and triggered response costs. It is the defendant that bears that burden. To defeat the government's motion for summary judgment on the issue of divisibility, Alcan need only show that there are genuine issues of material fact regarding a reasonable basis for apportionment of liability. As other courts have noted, apportionment itself is an intensely factual determination. *See, e.g., Chem-Dyne*, 572 F.Supp. at 811.

[24] In so ruling we candidly admit that causation is being brought back into the case--through the backdoor, after being denied entry at the frontdoor--at the apportionment stage. We hasten to add nonetheless that causation--with the burden on defendant--is reintroduced only to permit a defendant to escape payment where its pollutants did not contribute more than background contamination and also cannot concentrate. To state this standard in other words, we adopt a special exception to the usual absence of a causation requirement, but the exception is applicable only to claims, like Alcan's, where background levels are not exceeded. And, we recognize this limited exception only in the absence of any EPA thresholds.

[25] Contrary to the government's position, commingling is not synonymous with indivisible harm, and Alcan should have the opportunity to show that the harm caused at PAS was capable of reasonable apportionment. It may present evidence relevant to establishing divisibility of harm, such as, proof disclosing the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site. *See Alcan-Butler,* 964 F.2d at 270 n. 29, 271; *Monsanto,* 858 F.2d at 172 n. 26.

Alcan declares that the response actions at PAS were attributable to substances such as PCB's, nitro benzene, phenol, dichlonoethone, toluene, and benzene. It contends that no soil contamination due to heavy metals was found there, and insists that the metallic constituents of its oil emulsion are insoluble compounds, submitting an affidavit supporting this theory of divisibility. The government submitted a declaration stating that metal contaminants like those found in Alcan's waste emulsion were present in environmental media at PAS, that the commingling of metallic and organic hazardous substances resulted in indivisible harm, and that though some forms of lead, cadmium and chromium are insoluble, they may chemically react with substances and become water-soluble. These differing contentions supported by expert affidavits raise sufficient questions of fact to preclude the granting of summary judgment on the divisibility issue.

B. Timing of the Divisibility Issue

[26] The Third Circuit concluded that a divisibility inquiry is one "best resolved at the initial liability phase" because it involves "relative degrees of liability." *See Alcan-Butler,* 964 F.2d at 270, n. 29 (emphasis in original). Although we prefer this common sense approach, it may be contrary to the statutory dictates of CERCLA. In *Shore Realty Corp.,* 759 F.2d at 1032, we reviewed CERCLA's language and legislative history and concluded that the federal government through the EPA responds to releases or threatened releases of hazardous substances immediately and later attempts to collect the remediation costs from others. *See id.* at 1041. We also determined, as previously stated, that importing a causation requirement into the strict liability of § 9607(a) would render the affirmative defenses in § 9607(b) superfluous. *Id.* at 1044-45. Legislative support for that view is found in House Report No. 96-1016's statement of the purpose of the original bill. It envisioned that the EPA would "pursue rapid recovery of the costs" incurred in clean-up. H.R.Rep. No. 96-1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

A similar review of the legislative history of CERCLA and the SARA amendments of 1986 was undertaken in *Murtha,* which construes the Act and its amendments to enable the EPA to respond "efficiently and expeditiously" to environmental threats and to hold the parties responsible liable for the cleanup costs in an action by the EPA to recoup them. *See Murtha,* 958 F.2d at 1198. In those cases

where this burden of recoupment costs is unfair or disproportionate, such may be alleviated under § 9613(f)(1) after the response costs are fixed. *Id.* at 1206. Again, we are told in the Judicial Review portion of House Report No. 99-253(I) that "[t]o avoid delay of cleanups and to minimize litigation, responsible parties would be allowed to challenge the cleanup remedy after acknowledging liability for the hazardous waste site." H.R.Rep. No. 99-253(I), 99th Cong., 2d Sess. 59, reprinted in 1986 U.S.C.C.A.N. 2835, 2841 (emphasis added). The administrator of the EPA, who was primarily responsible for drafting the SARA amendments, at the time of their enactment declared they would "[e]xpedite civil actions by requiring that separate suits be brought against other potentially liable parties for contribution after judgment or settlement in enforcement actions." *Id.* at 124, 1986 U.S.C.C.A.N. at 2906 (emphasis added).

Consequently, the language of CERCLA and SARA and their legislative histories appear to demonstrate the following chronology: liability is fixed first and immediately for enforcement purposes; litigation later to sort out what contribution is owed and by whom as a result of the remediation effort. But we do not rule that this chronology be followed or that the *Alcan-Butler* approach of deciding divisibility at the initial liability phase of the case is the best way for the district court to proceed. Instead, the choice as to when to address divisibility and apportionment are questions best left to the sound discretion of the trial court in the handling of an individual case.

IV Cornell
A. Potentially Liable Party under CERCLA

[27] Cornell believes it should be shielded from liability for contribution by virtue of having resolved its liability to the United States and the State of New York. We discuss first whether Cornell is a potentially liable party under CERCLA § 9607. CERCLA § 9613(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [9607(a)]." § 9613(f)(1). Of the four classes of individuals subject to liability under § 9607(a), Cornell submits that only the third--any person who by contract, agreement or otherwise arranged for disposal or treatment of hazardous substances--is relevant because it contracted to have its coal run-off sent to PAS. But, it continues, because the EPA removed the University from the list of those potentially *responsible* parties, a *fortiori,* it may not be a potentially *liable* party under § 9607(a). Alcan responds that Cornell's coal waste water was essentially the same as Alcan's oil emulsion, and that there is no principled basis under the statute for treating Cornell differently.

The statutory language imposes liability and contribution upon "any person" who arranges for disposal of waste at a facility. Under the plain meaning of this language it is difficult to see how Cornell could avoid being included. Cornell points to no cases that in fact have drawn the distinction it urges us to adopt. Hence, Cornell is a potentially liable party under s 9607(a)(3)

B. Retroactive Application of SARA

[28] Cornell was removed by the EPA in March 1986 from the list of potentially responsible parties before the SARA amendments' proceedings for contribution under s 9613 became effective on October 17, 1986. Compelled contribution, in its view, could therefore only occur as a result of retroactive application of SARA.

[29-31] If that statement reflected the whole matter, we would agree. There is a strong presumption against the retrospective application of a statute. It is familiar law, the Supreme Court instructs, that while judicial decisions operate retrospectively, statutes look only to the future. *See United States v. Security Indus. Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1982). No law, including SARA, should be construed retrospectively unless Congress' purpose can be satisfied in no other way or unless the statutory language admits of no other meaning. *See United States Fidelity & Guar. Co. v. Struthers Wells Co.*, 209 U.S. 306, 314, 28 S.Ct. 537, 539, 52 L.Ed. 804 (1908). Yet, in apparent conflict with this rule there is another principle: that a court should apply law existing at the time of its decision unless to do so is contrary to the plain meaning of a statute or would cause manifest injustice. *See Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974).

Fortunately, we need not choose between these conflicting precedents, *see Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 836-37, 110 S.Ct.

1570, 1576-77, 108 L.Ed.2d 842 (1990), because in the case at hand the outcome is the same under either rule. *Cf. Litton Sys., Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168, 170-71 (2d Cir.1984) (*Bradley* rule applies only to cases pending on direct appeal at time change in law occurs).

Prior to the 1986 SARA amendments to CERCLA, federal common law principles applied, and these rules did not shield Cornell from having contribution sought from it. *See United States v. Conservation Chem. Co.*, 628 F.Supp. 391, 402 (W.D.Mo.1985) (invoking 1977 Uniform Comparative Fault Act as to pre-SARA settlement). SARA's 1986 provision in s 9613(f) for a statutory cause of action for contribution codifies what had been generally held implicit under the 1980 Act. *See* H.R.Rep. No. 99-253(I), 99th Cong., 2d Sess. 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (SARA "confirms" federal right of contribution under CERCLA). In that Act courts are granted implicit authority, using appropriate equitable factors, to "allocate response costs among liable parties." *O'Neil*, 883 F.2d at 179. Hence, we are not applying SARA retroactively in order to hold Cornell liable for contribution as the University asserts; rather, we are relying on common law principles that predated SARA.

C. Required to Contribute

[32] The last point Cornell raises is that since it resolved its liability in an administratively approved settlement, it should be insulated from any requirement to contribute. CERCLA § 9613(f)(2) provides that a "person who has resolved its liability

to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution." § 9613(f)(2).

The district court thought § 9613 was inapplicable and that the EPA and Cornell did not settle any question of liability. Rather, it believed the government--employing prosecutorial discretion--simply chose not to sue Cornell. The University naturally views the situation quite differently. Itasserts this is not a case of prosecutorial discretion. We are told instead that the government entered into negotiations with the University, requested and received technical studies from it, and ultimately decided not to hold it liable. This interaction, according to Cornell, constitutes an "administrative settlement."

[33] Although this argument appears at first blush to be compelling, upon closer examination it does not carry the day. First, if the SARA amendments were to be applied retrospectively, the negotiations between Cornell and the EPA did not amount to an "administrative settlement" because those procedural steps necessary to effectuate a settlement under CERCLA s 9622 were not followed. Section 9622, which deals in part with *de minimis* settlements, states that a settlement "shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement," and where the total response costs exceed $500,000, as they do here, such an order may only be issued "with the prior written approval of the Attorney General." 42 U.S.C. § 9622(g)(4). Further settlement procedures

procedures set forth in § 9622(i)(1) include notice of such being published in the Federal Register, which concededly did not take place in the instant case. Only when these procedures are followed is a party shielded from a contribution claim.

[34] Second, applying the SARA amendments prospectively, Cornell has not met the requirements for protection from contribution under federal common law. Under § 6 of the Uniform Comparative Fault Act, "[a] release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution." *See Conservation Chem. Co.,* 628 F.Supp. at 402 (principles of 1977 Uniform Comparative Fault Act are "the most consistent with, and do the most to implement" congressional intent underlying CERCLA). The EPA merely advised Cornell that it was removing Cornell from the list of potentially responsible parties. The EPA and Cornell did not enter into a release, covenant not to sue, or any other similar, legally binding agreement.

We are satisfied therefore that the district court properly found Cornell liable or potentially liable under § 9607(a) of the Act and that federal common law rules under § 9613(f)(1) made Cornell liable to a suit for contribution. Having said this, we note that if at the directed hearing Alcan succeeds on any issue and has its contribution reduced, Cornell's share should also be reduced since it has been determined that its contribution is fixed at six percent of Alcan's. As an equitable consideration, the University should also be given an opportunity to have its waste water

claim evaluated in the same light as Alcan's similar claim. If indeed, as Cornell claims, it can show that the University's wastes did not, when mixed with other wastes, contribute to the release or resultant response costs, then Cornell should succeed on this § 9604(a)(3) issue, and it would of course avoid any liability or contribution.

CONCLUSION

After careful consideration of all the other arguments raised by the parties, we find they do not need to be addressed as our opinion fully disposes of them. Accordingly, for the reasons stated the district court's amended final judgment of May 29, 1992 is affirmed, in part, and reversed, in part, and remanded for further proceedings, and the order of January 15, 1991 is also remanded for further proceedings, both consistent with this opinion.

UNITED STATES OF AMERICA and
State of New York,
Plaintiffs,

v.

ALCAN ALUMINUM CORP., et al.,
Defendants.

ALCAN ALUMINUM CORP.,
Third-Party Plaintiff,

v.

CORNELL UNIVERSITY,
Third-Party Defendant.

No. 87-CV-920.

United States District Court,
N.D. New York.

Jan. 15, 1991.

United States and State of New York sought to recover response costs for cleanup of hazardous waste site. The District Court, McAvoy, J., held that: (1) party whose wastes were deposited at the site and whose waste contained hazardous materials was liable despite claim that the hazardous substances were present in the waste at less than normal background levels; (2) there is no requirement in CERCLA that an element or compound have a reportable quantity in order for it to be hazardous; (3) particular substance

need not be in a specific chemical form in order to be hazardous; but (4) responsible party was entitled to contribution from another party.

Ordered accordingly.

[1] HEALTH AND ENVIRONMENT k25.5(5.5)

Liability under CERCLA is strict, and is joint and severable unless the defendant demonstrates that the harm is indivisible. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[2] HEALTH AND ENVIRONMENT k25.5(5.5)

Liability under CERCLA in a cost recovery action presents an issue separate and distinct from that posed by the issue regarding which incurred response cost the defendant is obligated to pay. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[3] HEALTH AND ENVIRONMENT k25.5(5.5)

Hazardous substances under CERCLA include all substances so designated under other statutes pursuant to the grant of authority contained therein, in addition to substances so designated by the Environmental Protection Agency (EPA) pursuant to the grant of authority in CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), 102(a), as amended, 42 U.S.C.A. §§ 9601(14), 9602(a).

[4] HEALTH AND ENVIRONMENT k25.5(5.5)

CERCLA does not impose any quantitative

requirement on the term "hazardous substance," and the mere listing of an element, compound, or hazardous waste establishes that a substance is hazardous as a matter of law. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102(a), as amended, 42 U.S.C.A. §§ 9601(14), 9602(a).

[5] HEALTH AND ENVIRONMENT k25.5(5.5)

Substance need not be in a specific chemical form, such as one making it water soluble, in order to be hazardous for purposes of CERCLA, and a compound containing a listed element found in the released matter need not itself be specifically and separably listed in order to be a hazardous substance for purposes of CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of §1980, §§ 101(14), 102(a), as amended, 42 U.S.C.A.§§ 9601(14), 9602(a).

[6] HEALTH AND ENVIRONMENT k25.5(5.5)

There is no requirement in the CERCLA statutory or regulatory scheme that an element or compound have a reportable quantity in order for it to be hazardous. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(14), 102(a), as amended, 42 U.S.C.A. §§ 9601(14), 9602(a).

[7] HEALTH AND ENVIRONMENT k25.5(5.5)

Fact that emulsion which had been deposited at hazardous waste site contained level of metals designated as hazardous substances well below that found in virgin oil did not bring that waste within the

petroleum exception to CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), as amended, 42 U.S.C.A. § 9601(14).

[8] HEALTH AND ENVIRONMENT k25.5(5.5)

Petroleum exception to CERCLA does not include oil which has become contaminated with hazardous substances through use; that which comes within the ambit of the petroleum exception is oil or oil fraction which naturally contains the hazardous substances. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), as amended, 42 U.S.C.A. § 9601(14).

[9] HEALTH AND ENVIRONMENT k25.5(2)

CERCLA is not void for vagueness. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[10] STATUTES k47

To withstand void for vagueness challenge, it is sufficient if the meaning of the statutory or regulatory language is discoverable from its context.

[11] HEALTH AND ENVIRONMENT k25.5(10)

Party which had produced emulsion which had been deposited at hazardous waste site did not show selective prosecution under CERCLA in view of fact that it was one of 83 named defendants with respect to that site. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[12] HEALTH AND ENVIRONMENT k25.5(5.5)

Costs which may be covered under CERCLA include those for such activities as investigations, monitoring, and testing to identify the extent of danger to the public health or welfare or the environment, or to identify the extent of the release of hazardous substances, and planning and implementation of a response action; also recoverable are indirect costs associated with those items and with the enforcement of CERCLA provisions, including administrative costs incurred by the staffs of the regulatory agencies involved and by the Department of Justice. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(23-25), 107(a), as amended, 42 U.S.C.A.§§ 9601(23-25), 9607(a).

[13] HEALTH AND ENVIRONMENT k25.15(5.1)

Party from whom response costs are sought under CERCLA bears the burden of proof on the issue of severability. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, s 107(a), as amended, 42 U.S.C.A.§ 9607(a).

[14] HEALTH AND ENVIRONMENT k25.5(5.5)

Environmental harm inflicted at hazardous waste site was indivisible, so that responsible party was jointly and severably liable for recovery costs, where contaminants found in the soil and water were commingled. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[15] HEALTH AND ENVIRONMENT k25.5(5.5)

All that is required for the recovery of CERCLA cleanup costs is that there be a release or a threatened release of a hazardous substance which causes the incurrence of response costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[16] HEALTH AND ENVIRONMENT k25.5(5.5)

There is no requirement that plaintiff seeking to recover response costs under CERCLA demonstrate a causal nexus between defendant's conduct and the contamination of the property involved; what is required, at most, is that the plaintiff demonstrate some relationship between the release and a response. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[17] HEALTH AND ENVIRONMENT k25.5(5.5)

Government seeking to recover response costs under CERCLA need not trace releases of hazardous substances to a particular responsible party; it is sufficient if the site contains hazardous substances found in that party's waste which were dumped at that site. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

[18] HEALTH AND ENVIRONMENT k25.5(5.5)

Party whose wastes were dumped at hazardous waste site and which contained hazardous substances found at the site could not avoid liability under

CERCLA on the grounds that the contaminants were not in a sufficiently high concentration to warrant the response. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A.§ 9607(a).

[19] CONTRIBUTION k5(6)

Where no settlement was entered into at the administrative or judicial level between potentially responsible party and the United States with respect to response costs and the party was merely dropped as a potentially responsible party, it could be held liable for contribution to another responsible party. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(g), as amended, 42 U.S.C.A. § 9622(g).

[20] CONTRIBUTION k8

Party which had been dropped as a potentially responsible party during administrative proceedings could not avoid contribution to responsible party for CERCLA response costs on the grounds that it had never had the opportunity to participate in the judicial settlement to establish its de minimus status. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 122(g), as amended, 42 U.S.C.A. § 9622(g).

Frederick J. Scullin, Jr., U.S. Atty. (Craig A. Benedict, of counsel), Syracuse, N.Y., and Richard B. Stewart, Asst. Atty. Gen. Land and Natural Resources Div., Environmental Enforcement Section (Michael Bardee, Henry Friedman, of counsel), Washington, D.C., for plaintiff U.S.

Robert Abrams, Atty. Gen. State of N.Y. (David A. Munro, Karen Kimball, of counsel), Albany, N.Y., for plaintiff State of N.Y.

Lawrence A. Salibra, II, Cleveland, Ohio, for defendant Alcan Aluminum Corp.

Thomas Mead Santoro, Patricia McClary, Cornell University, Office of University Counsel, Ithaca, N.Y., for third-party defendant Cornell University.

MEMORANDUM-DECISION AND ORDER

McAVOY, District Judge.

Introduction

By this action, the United States of America and the State of New York initially sought to recover from some 83 business entities response costs under section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607 (as amended), in connection with the clean-up of an inactive hazardous waste site formerly owned by Pollution Abatement Services of Oswego, Inc. (PAS) and currently owned by the County of Oswego. At the time the action was commenced, those costs exceeded $12 million. Shortly after commencement, plaintiffs entered into a consent decree with 82 of the defendants recovering some $9,105,308.17; Alcan Aluminum Corp. was the lone holdout and the suit continued as against it for the difference between the stipulated amount of incurred costs ($12,319,551.04) and the amount recovered in the partial settlement. Additional costs have been incurred since then and

currently total in excess of $13 million. Discovery having been concluded, the parties' dispute (in the main action) is before the court on cross motions for summary judgment. The third-party action is also before the court on cross motions for summary judgment. For the reasons that follow, the court grants the motions of the United States and the State of New York as against Alcan Aluminum Corp. in their entirety in the main action and thereby denies Alcan's motion; insofar as the third-party action is concerned, the court grants Alcan's motion to the extent of declaring that third-party defendant Cornell University is also liable for its fair share of response costs incurred by the United States and the State of New York and accordingly denies the motion of Cornell University. A hearing is necessary to determine the amount of that fair share.

Background

A. Historical

From approximately 1970 until 1977, various chemical waste materials were received for disposal or treatment at the PAS site. As a result of PAS operations, the site's surface became contaminated by hazardous substances because of wastes leaching from drums, lagoons being overtopped and surface runoff.

During the 1970 through 1977 period, Alcan, by contract, agreement or otherwise, arranged for the disposal or treatment at the PAS facility 4,607,380 gallons of an emulsion generated at its plant in Oswego, New York in conjunction with the hot rolling of aluminum ingots. (In addition to aluminum, the ingots used by Alcan contained chromium, copper, lead

and zinc.) The Alcan emulsion, basically a mixture of water (primarily) and mineral oil, was circulated and recirculated through the rolls, picking up fragments of ingots containing aluminum, chromium, copper, lead and zinc in the process, until removed from the manufacturing process and sent to the PAS facility. (In addition to aluminum, chromium, copper, lead and zinc, defendant concedes that its emulsion contained cadmium.) During this period, Alcan, by contract, agreement or otherwise also arranged for the disposal at the PAS facility of 200 gallons of polychlorinated biphenyls.

In 1976 and 1977, the United States began undertaking response measures at the PAS site; in 1978, the State, in conjunction with the United States, conducted a surficial cleanup which included removing 4,000 drums from the site; in 1982, the United States and the State entered into a formal cooperative agreement to address the environmental problem posed by the PAS site. This lawsuit followed.

B. Statutory

Through CERCLA, enacted in 1980 as a comprehensive response to the environmental threat posed by the disposal of hazardous substances, Congress has provided the federal government and the States, through cooperative agreements with the Environmental Protection Agency, with an effective means to clean up toxic waste sites around the country and with the authority to force those persons responsible for creating the hazardous conditions to bear the cost of the cleanups. *See United States v. Monsanto Co.,* 858 F.2d 160, 167 and n. 8 (4th

Cir.1988), *cert. denied,* 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 805 F.2d 1074, 1081 (1st Cir.1986); *State of New York v. Shore Realty,* 759 F.2d 1032, 1040-1041 (2d Cir.1985); 42 U.S.C. §§ 9604(d)(1) and 9607(a) (1983 and Supp.1990). In pertinent part, CERCLA provides as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
> ....
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment ... of hazardous substances owned or possessed by such person ... at any facility ... owned or operated by another party or entity and containing such hazardous substances
> ....
> ... from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
> (A) all costs of removal or remedial action incurred by the United States Government or a State ... not inconsistent with the national contingency plan[.] 42 U.S.C. § 9607(a)(3) (Supp.1990); *see also Shore Realty,* 759 F.2d at 1043, 1043 n. 16 (commenting on the correct construction of section 9607(a)).

[1, 2] As various courts have noted, liability under CERCLA, which is strict, *Shore Realty,* 759 F.2d at 1044, and joint and several unless the defendant

demonstrates that the harm is divisible, *O'Neil v. Picillo,* 883 F.2d 176, 178-179 (1st Cir.1989), *cert. denied sub nom. American Cyanamid Co. v. O'Neil,* --- U.S. ----, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990), would be established in this "cost recovery" action if the plaintiffs prove each of the following:

1) the PAS site is a "facility" within the meaning of 42 U.S.C.§ 9601(9)(B);

2) a "release", *see* 42 U.S.C. § 9601(22), or "threatened release" of hazardous substances, *see* 42 U.S.C. § 9601(14), has occurred at the PAS site;

3) the release or threatened release has caused the United States and the State of New York to incur response costs, *see* 42 U.S.C. § 9607; and

4) Alcan falls with at least one of the four classes of responsible persons described in 42 U.S.C. § 9607(a), *see United States v. Aceto Agricultural Chemicals Corp.,* 872 F.2d 1373, 1378-1379 (8th Cir.1989); *see also Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664, 668 (5th Cir.1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F.2d 1146, 1150 (1st Cir.1989); *Shore Realty,* 759 F.2d at 1043-1045, and if Alcan fails to establish by a preponderance of the evidence one of the three narrow defenses provided by 42 U.S.C. § 9607(b), *Amoco Oil,* 889 F.2d at 668; *Shore Realty,* 759 F.2d at 1042, 1044. Liability under CERCLA in a "cost recovery" action presents an issue separate and distinct from that posed by the issue regarding which incurred response costs defendant is obligated to pay. *Amoco Oil,* 889 F.2d at 668.

Discussion

A. Alcan's liability

Much of what plaintiffs need to prove in order for liability to be imposed on Alcan is not in dispute. In its attempt to resist liability, Alcan argues essentially that the concentrations of cadmium, chromium, copper, lead and zinc in its emulsion are less than background levels and, therefore, do not constitute hazardous substances under CERCLA. Slightly more specifically, Alcan seeks to have this court read into the statutory and regulatory scheme (1) a requirement that in order for the listed substances to be deemed "hazardous" these substances must be present in a certain amount or concentration and (2) a requirement that the listed substance be present in a "harmful" form, after all, defendant argues, several of these substances and many listed by the EPA occur naturally and are even essential to the continued existence of life. Underlying defendant's position, however, is, perhaps, the more fundamental argument, related to its argument that substances must be in a specific form in order to be deemed "hazardous," that its waste oil emulsion and the substances it concedes were contained therein are not specifically listed in the 40 C.F.R. § 302.4 Table of Hazardous Substances and, therefore, the court must apply the provisions of 40 C.F.R. s 302.4(b) pertaining to unlisted substances in order to determine whether its waste oil emulsion and the cadmium, chromium, copper, lead and zinc contained therein are "hazardous substances" under CERCLA. This is so, defendant argues, because the "generic headings" in the Table 302.4 list do not have a Chemical Abstract Service Registry Number, a Reportable Quantity or a

Resource Conservation and Recovery Act number. For the reasons that follow, defendant's position is rejected as meritless; suffice it to say that the court will not rewrite the statutory and regulatory scheme to suit defendant's needs and desires. Congress and the EPA, through a congressional grant of authority, have spoken; the court's task is to apply the law in as straightforward a manner as possible, consistent with the dictates of the Constitution, so as to give full effect to the policy underlying CERCLA.

[3] A "hazardous substance" is defined in CERCLA by reference to its provisions and to that of other environmental statutes. Specifically, Congress has provided that

> [t]he term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or [t]he term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to

> which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (Supp.1990); *see also id.* § 9602(a) (Supp.1990) (authorizing the Administrator to designate additional substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment). Hazardous substances under CERCLA, then, include all substances so designated under other statutes pursuant to the grant of authority contained therein in addition to sutances so designated by the EPA pursuant to the grant of authority under 42 U.S.C. § 9602(a). *See United States v. Monsanto Co.,* 858 F.2d at 165 n. 4. Accordingly, pursuant to the various grants of authority under other environmental laws, the EPA has promulgated a list of "hazardous substances" under section 311(b)(2)(A) of the Clean Water Act (codified at 40 C.F.R. Table 116.4 (1990)), a list of "toxic pollutants" under section 307(a) of the Clean Water Act (codified at 40 C.F.R. § 401.15 (1990)), a list of "hazardous wastes" under section 3001 of the Resource Conservation and Recovery Act (appearing at 40 C.F.R. §§ 261.30-261.33 (1990)), and a list of "hazardous air pollutants" pursuant to section 112 of the Clean Air Act (codified at 40 C.F.R. s 61.01(a) (1989)). Additionally, pertinent CERCLA

regulations provide that " '[h]azardous substance' means any substance designated pursuant to 40 CFR Part 302," 40 C.F.R. § 302.3 (1989), and that "[t]he elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(a) of the Act [i.e., 42 U.S.C. § 9602(a)]," 40 C.F.R. § 302.4 (1989). It bears noting, however, that each of the elements, compounds and hazardous wastes appear on the Table 302.4 List of Hazardous Substances by virtue of one or more of four statutory sources--to wit, sections 307(a) and 311(b)(4) of the Clean Water Act, section 112 of the Clean Air Act and section 3001 of the Resource Conservation and Recovery Act. *See* 40 C.F.R. § 302.4 note and Table 302.4 footnotes. Table 302.4, then, appears to be nothing more than a compilation of hazardous substances so designated already under the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act.

[4-6] In response to defendant's argument, suffice it to say that "[t]he plain statutory language fails to impose any quantitative requirement on the term hazardous substance," *Amoco Oil,* 889 F.2d at 669, and, as noted in *Amoco Oil*, that the mere listing of an element, compound or hazardous waste establishes that a substance is hazardous as a matter of law is a holding supported by courts that have considered the definitional requirements of the term and the congressional comments contained in the legislative history, *id.* (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1151-1152; *Eagle-Picher Indus. v. United States*, 759 F.2d 922, 927 (D.C.Cir.1985); *City of New York v. Exxon Corporation,*

744 F.Supp. 474, 483-487 (S.D.N.Y.1990); *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1147 (D.Ariz.1984)); *United States v. Carolawn Co.*, 21 Env't Rep.Cas. (BNA) 2124, 2125, 2126 (D.S.C.1984); *see also United States v. Western Processing Co., Inc.*, 734 F.Supp. 930, 936 (W.D.Wash.1990) (government need not prove that the release was above background levels; the principle that the law does not concern itself with trifles is not a defense to CERCLA liability); *United States v. Nicolet, Inc.*, 712 F.Supp. 1205, 1207 (E.D.Pa.1989) (noting that, "as long as a substance is on one or more of the lists identified at 42 U.S.C. § 9601(14), it is a hazardous substance irrespective of the volume or concentration of the substance found at the site in question"). In the court's view, there is no principled basis upon which to deviate from the foregoing rule that the mere listing of a substance by EPA renders that substance hazardous. That various listed substances are naturally found in the environment (i.e., in the normal course of events) does not stand in the way of imposing liability against a generator of that substance--the corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable. Similarly, there is simply nothing in the statute or the regulations which supports the view that a particular substance is "hazardous" only if it is in a specific chemical form, that is, in a form that makes the substance water-soluble. Also, the compound

containing a listed element found in the released matter need not itself be specifically and separately listed--such compounds are hazardous substances under CERCLA by virtue of their inclusion, insofar as is pertinent here, in the specifically listed generic or broad class of elements and compounds designated under section 307(a)(1) of the Clean Water Act: "chromium and compounds," "copper and compounds," "lead and compounds," and "zinc and compounds" are expressly so included in "the list of toxic pollutants designated pursuant to section 307(a)(1) of the [Clean Water] Act," 40 C.F.R. § 401.15 (1990), thereby rendering all of these elements and their compounds "hazardous substances" under CERCLA; this list was expressly made a part of the Table 302.4 List of Hazardous Substances. That the generic or broad class of hazardous elements and compounds does not itself have a "Chemical Abstract Service Registry Number" (CASRN) is immaterial inasmuch as that number appears only for the convenience of the user. *See* 40 C.F.R.§ 116.4. That the generic or broad class of hazardous elements and compounds was not assigned a Final RQ (Reportable Quantity), a quantity of the hazardous substance the release of which requires notification, see 40 C.F.R. §§302.3, 302.5 and 302.6, although it has been assigned a statutory RQ, is also immaterial inasmuch as a substance is deemed hazardous presumably because of the unacceptable risks it poses to human health and to the environment. There is simply no requirement in the statutory or regulatory scheme that an element or compound have an RQ in order for it to be "hazardous," and, in fact, the statutory scheme reveals otherwise. The term "hazardous substance" includes

any toxic pollutant listed under section 307(a) of the Clean Water Act, *see* 42 U.S.C. § 9601(14)(C), yet these listed toxic pollutants do not have a final RQ (nor do they have a CASRN, for that matter).

The court notes in passing its disagreement with the court in *City of New York v. Exxon Corporation* to the extent that that court appears to have held, at least preliminarily, that 40 C.F.R. § 302(b) and not section 302(a) is applicable to determining whether Alcan's waste oil emulsion or the specific compounds in it are hazardous substances under CERCLA because the waste oil emulsion and the specific compounds found therein are not squarely listed in Table 302.4. *See* 744 F.Supp. at 487-488. Suffice it to say, first, that Alcan has conceded that its waste oil emulsion contained cadmium, chromium, copper, lead and zinc and, second, that these elements and all their respective compounds are hazardous substances under CERCLA by virtue of their designation as toxic pollutants under the Clean Water Act which list was, as has already been noted, included, pursuant to 42 U.S.C. § 9601(14)(B) and perhaps reduntantly so, in the Table 302.4 List of Hazardous Substances and Reportable Qantities; as such, the court need not ever consider the pertinence of 40 C.F.R. § 302.4(b) (and the regulations--40 C.F.R. §§ 261.2, .4(b) and .20-.24--referenced therein) and therefore it is unnecessary for the court to engage in any discussion of ignitability, corrosivity, reactivity or EP (Extract Procedures) toxicity to determine whether a substance is to be deemded "hazardous."

The court also notes its disagreement with the

court in *Amoco Oil* to the extent that that court has seemingly read into the language of 42 U.S.C.§ 9607(a)(4) the requirement *539 that, in order for a release of a hazardous substance to have caused (and justified) the incurrence of response costs, and hence in order for there to be liability, the release violate some applicable State or Federal standard imposing a threshold quantity or concentration requirement. *See* 889 F.2d at 669-672. In essence, that court, while recognizing that the "plain statutory language fails to impose any quantitative requirement on the term hazardous substance," *id.* at 669, has imposed such a requirement on the imposition of liability in the attempt to limit the scope thereof. Suffice it to say that such an interpretation (which the Amoco Oil court conceded necessitated the "ent[ry] of unexplored territory," *id.* at 670) is not warranted by the plain language of the statute and in fact appears to conflict with that language. *See United States v. Western Processing Co.,* 734 F.Supp. at 936-937 and 941-942 (concluding that *Amoco Oil* should be confined to its facts and implicitly calling that court's reasoning into doubt).

[7][8] As part of its effort to resist liability, defendant also argues that the "petroleum exception" to the term "hazardous substance" is applicable here. The pertinent CERCLA provision, 42 U.S.C. § 9601(14) (defining "hazardous substance") (quoted above), states that "[hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph...."

Specifically, defendant argues that its emulsion contains levels of metals designated as hazardous substances well below that found in virgin oil and, therefore, its "waste is clearly within the petroleum exclusion." Defendant's Memo of Law at 11. Disposing of this argument need not detain the court for long.

Suffice it to say that a plain reading of this "exclusionary" provision does not warrant inclusion of oil which has become contaminated with hazardous substances through use; rather, what does come within the ambit of the "petroleum exclusion" is the oil or oil fraction which naturally contains the hazardous substance(s) unless the fraction itself is specifically listed or designated as a hazardous substance. This interpretation of the "petroleum exclusion" appears to be in line with the legislative history, scant as it is, which indicates that the "petroleum exclusion" is an exclusion from CERCLA for "oil spills" themselves and not for releases of oil which through use has become contaminated with (hazardous) substances not naturally found in oil. *See, e.g.*, S.Rep. No. 848, 96th Cong., 2d Sess. 30-31 (1980); 126 Cong.Rec. H11787, H11790, H11792, H11793, H11795, H11796, H11798 (daily ed. December 3, 1980); 126 Cong.Rec. S10578 (daily ed. August 1, 1980); *id.* at S10845 (daily ed. August 5, 1980); *id.* at S14963, S14967, S14974, S14980 (daily ed. November 24, 1980).

Lastly, defendant advances two constitutional challenges to imposition of liability: first, that the statute is void for vagueness because it does not

adequately define "hazardous substance"; second, that the "selective" enforcement of CERCLA against it, the government choosing not to name other, allegedly more culpable entities--e.g., Cornell University--as defendants, violates the principle of equal protection of the laws.

[9][10] Neither challenge has merit. The void for vagueness challenge fails because, in the court's view, the statute and regulations do not fail to give a person of ordinary intelligence fair notice of what is required and forbidden. *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *see also United States v. McElroy,* 910 F.2d 1016, 1021 (2d Cir.1990) (observing that a penal statute is not unconstitutionally vague if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and that does not encourage arbitrary and discriminatory enforcement."). Moreover, it has been observed that "[t]he degree of vagueness that the Constitution tolerates ... depend[s] in part on the nature of the enactment[,]" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982), and that with respect to "regulatory statutes governing business activities, greater leeway is allowed," *Papachristou,* 405 U.S. at 165, 92 S.Ct. at 845. All the more is this so when matters of public health and safety are concerned. See West Virginia Manufacturers Ass'n v. State of West Virginia, 714 F.2d 308, 314 (4th Cir.1983). To withstand a void for vagueness challenge, it is sufficient if the meaning of the statutory or regulatory

language is discoverable from its context. *See id.* In this regard, the court notes that a plain reading of the statutory and regulatory scheme reveals that a substance is hazardous if it has been listed, i.e., so designated, by the EPA pursuant to authority granted it by Congress.

[11] As for defendant's other constitutional challenge, putting aside the broad discretion the government has regarding the exercise of its power to prosecute, *see Wayte v. United States,* 470 U.S. 598, 607-608, 105 S.Ct. 1524, 1530-1531, 84 L.Ed.2d 547 (1985), defendant has not established a *prima facie* case of selective enforcement. Simply stated, defendant has not shown that it has been singled out for civil prosecution for an improper purpose. *See University Club v. City of New York,* 655 F.Supp. 1323, 1328 (S.D.N.Y.1987), *aff'd on other grounds,* 842 F.2d 37 (2nd Cir.1988); *see also United States v. Garth,* 773 F.2d 1469, 1476 (5th Cir.), *cert. denied* 476 U.S. 1140, 106 S.Ct. 2246, 90 L.Ed.2d 693 (1986); *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974). The court notes, in passing, that Alcan was one of 83 named defendants.

In sum, the cadmium, chromium, copper, lead and zinc which defendant admits were in its emulsion are hazardous substances under CERCLA--regardless of the form in which these metals were present and notwithstanding the very low levels of concentration--by virtue of their designation as toxic pollutants under the Clean Water Act and their appearance on the Table 302.4 List of Hazardous Substances. In the court's view, the statutory

language is clear, rendering resort to legislative history, which in any way comports with the court's understanding of the statutory scheme, *see* S.Rep. No. 848, 96th Cong., 2d Sess. 24-27 (1980) ("[S]ubstances listed as hazardous or toxic under certain other Federal laws are incorporated by reference and upon enactment of this bill such substances become statutorily defined as hazardous substances for the purposes of this bill. And the release of any of them or any constituent of them invokes the ... response provisions and any costs of removal or remedial action or any damages are subject to the liability provision of the bill."), entirely unnecessary, *see United States v. Monsanto,* 858 F.2d at 167 n. 10. Needless to say the court agrees with the overwhelming body of case law that has confronted the issue presented here.

Hazardous substances, released by defendant, were present at the PAS site, and the government responded by cleaning up the site, *see* Declaration of Raymond E. Lupe with RI/FS attached as exhibit (establishing a nexus between defendant's release of the hazardous substances at the PAS site and the government's response thereto); defendant has not established any of the limited statutory defenses and its constitutional challenges are without merit. Accordingly, plaintiffs are entitled to summary judgment as to defendants' liability. The court now turns its attention to the matter of recovery of response costs.

B. Recovery of incurred costs

Under section 9607(a), Alcan is liable for "all costs of removal or remedial action incurred by the United

States Government or a State ... not inconsistent with the national contingency plan[.]" 42 U.S.C. § 9607(a)(4)(A); 40 C.F.R. §§ 300.1-300.71 (1989) (national contingency plan) (promulgated pursuant to 42 U.S.C. § 9605). The burden lies with the defendant to demonstrate that the costs incurred by the respective governments were inconsistent with the national contingency plan. *See United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 746 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *City of Philadelphia v. Stepan Chemical Co.*, 713 F.Supp. 1484, 1486 (E.D.Pa.1989). In the present case, plaintiffs seek to recover the difference between the stipulated amount of costs incurred through April 1, 1987 ($12,319,551.04) and the amount already recovered pursuant to the partial consent decree ($9,105,308.17) plus costs incurred since April 1, 1987 (some $710,635.17 by the United States and a net figure of $124,174 by the State of New York). Additionally, plaintiffs seek a declaration that Alcan is liable to both plaintiffs for future response costs associated with the PAS site and for prejudgment interest.

[12] In view of the statutory provisions defining the terms "remove" and "removal," *see* 42 U.S.C. § 9601(23), "remedy" and "remedial action," *see id.* § 9601(24), "respond" and "response," *see id.* § 9601(25), remedial or removal action, for which the federal and state governments are entitled to recover from the party found liable, necessarily includes such activities as (a) investigations, monitoring and testing to identify the extent of danger to public health or

welfare or the environment, (b) investigations, monitoring and testing to identify the extent of the release of hazardous substances, and (c) planning and implementation of a response action; also recoverable are "indirect" costs associated with the foregoing and with enforcement of the provisions of CERCLA, including administrative costs incurred by the staffs of the regulatory agencies involved and for the Department of Justice. *See United States v. Northeastern Pharmaceutical and Chemical Co.*, 579 F.Supp. 823, 850 (W.D.Mo.1984), aff'd in part and rev'd in part on other grounds, 810 F.2d 726 (8th Cir.1986); *see also United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1501-1504 (6th Cir.1989) (litigation and administrative costs recoverable including a proportionate share of indirect costs associated with cleanup operations), *cert. denied*, --- U.S. ----, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990); *State of New York v. Shore Realty Corp.*, 759 F.2d at 1043 (response costs include costs in assessing the conditions of the site); *United States v. Hardage*, 733 F.Supp. 1424, 1431-1432 (W.D.Okla.1989); *City of New York v. Exxon Corp.*, 633 F.Supp. 609 (S.D.N.Y.1986) (recoverable costs include costs of collecting and analyzing ground water samples, hydrogeological studies and remediation study); *State of New York v. General Electric Co.*, 592 F.Supp. 291, 298 (N.D.N.Y.1984); *United States v. Wade*, 577 F.Supp. 1326, 1333 n. 4 (E.D.Pa.1983).

Defendant does not challenge the legality of any of the costs plaintiffs seek to recover; that is, defendant does not argue that the costs which plaintiff seeks to recover are not within the scope of the pertinent statutory provisions. And, ample

documentation of the costs, direct and indirect, incurred by the EPA, the Department of Justice and the State of New York has been submitted to the court. Defendant's opposition to plaintiffs' summary judgment motion on incurred costs, aside from blanket denials to assertions of fact, is essentially three-fold: plaintiffs have not demonstrated that any of the claimed costs were associated with metals contamination and it has not so stipulated; (2) discovery is needed for it to respond to the costs incurred since April 1, 1987; and (3) its liability is severable. None of these arguments has merit. The court will address the severability argument first.

Alcan rather summarily contends that it cannot be held jointly and severally liable because the harm caused by it is severable. In this regard, Alcan points out that whatever harm its hazardous substances may have caused would be limited to soil contamination, but, because the EPA's RI/FS appears to indicate that the concentration of metals in the soil was not high enough to warrant concern, "no remediation of soils was necessary [and] the harm from metal is clearly divisible." Alcan's Memo of Law at 29.

[13][14] Only, brief comment is called for. First, defendant bears the burden of proof on the issue of severability, *see O'Neil,* 883 F.2d at 178-179; *United States v. Monsanto,* 858 F.2d at 171, and it has not demonstrated entitlement to judgment as a matter of law on this issue; second, the record amply demonstrates that the harm inflicted at the site was indivisible because the contaminants found in the soil and the water were commingled, *see* Declaration of

Raymond E. Lupe;Declaration of Eugene Meyer; and third, defendant has, in fact, confused divisibility of costs (irrelevant) with divisibility of environmental harm, *see, e.g., United States v. R.W. Meyer, Inc.,* 889 F.2d at 1507; *O'Neil,* 883 F.2d at 178-183; *United States v. Monsanto,* 858 F.2d at 171 n. 22. Congress, it bears noting, has acted to help ameliorate the potential harshness resulting from a determination that a defendant's liability is joint and several by enacting a right of action for contribution. *See* 42 U.S.C. § 9613(f) (Supp.1990); *see also United States v. Western Processing Co.,* 734 F.Supp. at 938.

Alcan's argument that plaintiffs have failed to demonstrate that any of the costs incurred were associated with metals contamination can be viewed as a challenge to the appropriateness of a portion of plaintiffs' response (i.e., that there was no contamination from metals), as a challenge to plaintiffs' response generally (i.e., that, if there was contamination from metals, plaintiffs have not itemized this expense), or as an argument that a nexus must be demonstrated between the response and an individual generator's contamination. However viewed, defendant's argument has no merit.

[15][16] All that section 9607(a) requires is that there be a release or threatened release of a hazardous substance which causes the incurrence of response costs in order for a statutorily-defined generator of a hazardous substance to be held liable for all costs incurred so long as such costs are not inconsistent with the National Contigency Plan. 42 U.S.C.§ 9607(a)(4)(A). As an initial matter, there is

absolutely no requirement that a plaintiff demonstrate a causal nexus between a defendant's conduct and the contamination of the property involved. *See, e.g., Dedham Water Co.,* 889 F.2d at 1152-1154. What appears to be required, at most, is that the plaintiff demonstrate some relationship between the release and a response. In this regard, the court notes that a release of hazardous substances occurred to which the government responded. Under the statute, then, the requisite nexus has been established. There is room, perhaps, to argue that a particular expenditure should not be included under the umbrella of "remedial action" because it is not sufficiently related to the release of the hazardous substances, but as noted defendant has not so challenged any of the claimed expenditures, and in any event the court is of the view that plaintiffs have amply demonstrated the relatedness of the direct and indirect expenditures of funds.

[17][18] Additionally, defendant has not argued, much less demonstrated, that the plaintiffs' response to the presence of hazardous substance at the site was inconsistent with the national contingency plan, *see Northeastern Pharmaceutical and Chemical Co.,* 810 F.2d at 747, that is, that the governments' choices of response actions were arbitrary and capricious, *see id.* at 748. It is not open to the defendant to challenge the response undertaken by the government as "unreasonable". *See id.* at 748. There is no doubt that Alcan's emulsion brought to the PAS facility contained the metals subsequently found at the site. The contaminants were found in the soil and the water and were commingled. Moreover, it bears

emphasizing that the government need not trace releases of hazardous substances to a particular defendant; it is sufficient if the site contains hazardous substances found in the defendant's wastes which were dumped at that site. *See City of New York v. Exxon Corporation,* 744 F.Supp. at 480 n. 10; *United States v. Western Processing Co.,* 734 F.Supp. at 936; *United States v. Marisol,* 725 F.Supp. 833, 840 (M.D.Pa.1989); *United States v. Wade,* 577 F.Supp. at 1333. Interestingly, defendant does not challenge the response to the groundwater contamination; nor does defendant argue that the surficial remedy did not clean up contaminants in the soil of the kind it contributed to the site. Its argument really is that the soil did not have to be cleaned up because the contaminants were not in a sufficiently high concentration to warrant the response. The court's response to this last argument is two-fold: the United States or the State of New York should not have to wait until the problem becomes worse by the addition of other generators' hazardous substances; and the statute contemplates the recovery of costs associated with the clean-up of hazardous substances present in an area. Underlying defendant's argument, then, is the view that there was no contamination of the soil because concentration levels were low. The statute indicates otherwise.

The court notes that defendant has not offered any evidence to raise a genuine dispute of fact regarding the specific dollars amounts claimed. Also, as for a response to plaintiffs' incurred costs since April 1, 1987, defendant, as plaintiffs point out, has not demonstrated its entitlement to relief under Rule

56(f)--simply put, defendant has not explained what efforts were made at obtaining discovery and why those efforts were unsuccessful; moreover, discovery closed as of November 30, 1989; apparently, defendant never bothered with discovery regarding costs incurred after April 1, 1987.

Accordingly, defendant having failed to establish that the governments' response costs were inconsistent with the National Contingency Plan, all the incurred costs are conclusively presumed reasonable, *see Northeastern Pharmaceutical and Chemical Co.,* 810 F.2d at 748, and plaintiffs are thereby entitled to recover the difference between the stipulated amount of costs incurred through April 1, 1987 ($12,319,551.04) and the amount already recovered pursuant to the partial consent decree ($9,105,308.17) plus costs incurred since April 1, 1987 (some $710,635.17 by the United States and a net figure of $124,174 by the State of New York).

Additionally, in recognition of the ongoing nature of response costs, pursuant to the authority granted the court under 42 U.S.C.§ 9613(g)(2) (Supp.1990), the court enters a declaratory judgment in plaintiffs' favor that defendant is liable to plaintiffs for future response costs associated with the PAS site "which will be binding on any subsequent action or actions to recover further response costs". Both plaintiffs are also entitled to recover prejudgment interest under 42 U.S.C. § 9607(a) (Supp.1990) on the total response costs recovered by each of them. As requested by plaintiffs, they are granted leave to file declarations, within 20 days of the date of this

memorandum-decision, setting forth the amount of such interest supported by the appropriate computations. Defendant will be allowed 10 days after such declarations are filed with the court to submit a response in opposition thereto if defendant feels the need to do so.

C. Cornell University's liability

As a protective measure, to hopefully ameliorate the potentially harsh effects of a judgment against it, Alcan commenced a third-party action naming Cornell University as defendant. By this third-party action, Alcan seeks a declaration that Cornell is jointly and severally liable for the response costs incurred by the United States and the State of New York relative to the PAS site and an order directing Cornell to contribute its fair share. According to the third-party complaint, Cornell has contributed waste to the PAS site in the form of processed coal pile leachate which contains compounds composed of materials of the same character but of greater concentration than the waste contributed by Alcan. Cornell answered the third-party pleading, denying certain allegations and asserting eight affirmative defenses. Alcan has moved for summary judgment against Cornell on the basis that Cornell sent treated coal pile leachate containing certain amounts of chromium, copper and zinc to the PAS site. In response, Cornell has cross-moved for summary judgment dismissing the third-party complaint essentially on the ground that, because the EPA decided not to name it as a potentially responsible party in the main lawsuit, Cornell is not a party from whom Alcan may seek contribution.

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act, legislation initially prompted by concern over the joint and several liability rule that had been judicially-grafted on to CERCLA. *See O'Neil,* 883 F.2d at 179. Although Congress decided not to add a provision explicity dealing with the matter of joint and several liability, *see United States v. Monsanto,* 858 F.2d at 171 n. 23, it did add two important provisions designed to mitigate the harshness of such liability. The first directs the EPA to offer early settlements to defendants who the agency believes are responsible for only a small portion of the harm, so-called de minimus settlements. *See O'Neil,* 883 F.2d at 179; 42 U.S.C. § 9622(g) (Supp.1990). The second creates a statutory cause of action for contribution, codifying what most courts had concluded was implicit in CERCLA as enacted in 1980. *See O'Neil,* 883 F.2d at 179 (noting in passing that, "[w]hile a right of contribution undoubtedly softens the blow where parties cannot prove that the harm is divisible, it is not a complete panacea since it frequently will be difficult for defendants to locate a sufficient number of additional solvent parties.");42 U.S.C. s 9613(f) (Supp.1990).

> In part, section 9613(f) provides as follows:
> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under ... section 9607(a) of this title.... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

42 U.S.C. s 9613(f)(1). Alcan does not expressly state what equitable factors ought to be considered by the court; underlying its motion, however, is the argument that, since Cornell contributed metals to the PAS site which were the same as those contributed by it and which were identified by EPA and judicially determined by the court to be hazardous substances, fairness requires that Cornell shoulder some of the financial burden. For its part, Cornell admits that it "sen[t] treated coal pile run off to the PAS site," Attorney Thomas Mead Santoro's Affid. at ¶ 4, but that it should not be held jointly and severally liable because, by being removed from the list of potentially responsible parties (PRP) just before commencement of the main action, its liability has been resolved. (The court notes that initially Alcan had also been dropped from the list; Alcan was "placed back on the list apparently after the EPA discovered some documents that suggested that Alcan's emulsion was E.P. toxic." Alcan's Response to Cornell's Cross Motion at 4 n. 1.) Cornell asserts that "the last waste-in list prepared for PAS provided to Cornell before its removal from the list of PRP's by the EPA [in March 1986] discloses a volume which, if it had been considered hazardous by the EPA, would have made Cornell a *de minimus* contributor (i.e. less than 1%)." Attorney Thomas Mead Santoro's Affid. at ¶ 5. As support for its argument that it has resolved its liability with the EPA and, therefore, may not, or should not, be held liable for contribution, Cornell relies on 42 U.S.C. §§ 9613(f)(2) and 9622(g). A careful reading of these two sections reveals quite readily that Cornell's reliance on them is sorely misplaced.

[19] Section 9613(f)(2) provides that

> [a] person who has resolved its liability to the United States ... in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Section 9622(g), relating to *de minimus* settlements, provides in part as follows:

> (1) Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section ... 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, [certain other conditions are met][.]
>
> ....
>
> (4) A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement.
>
> ....
>
> (5) A party who has resolved its liability to the United States under this subsection shall not be liable for calims for contribution regarding matters addressed in the settlement.

42 U.S.C. § 9622(g)(1), (4), and (5) (Supp.1990). Suffice it to say that no settlement was entered into at the administrative or judicial level between Cornell and the United States; Cornell was merely dropped as a potentially responsible party; in other words, the United States chose, for whatever reasons and in its discretion, not to pursue any legal action against Cornell. As such, Cornell's liability has not been resolved within the meaning of the foregoing statutes.

[20] Cornell's cross motion, then, rises or falls based on the application of equitable factors deemed appropriate. Cornell's argument in this regard is tortured. First it argues that it would be unfair for the court to subject it to liability because it never had the opportunity to participate in the judicial settlement, having been "relieved" from responsibility prior thereto, but then argues that, because its responsibility has been determined to be less than that of certain *de minimus* parties, its liability can, at most, be less than that paid by the *de minimus* parties. Suffice it to say that Cornell's cross motion must be denied. In the court's view, there is no question that Alcan is entitled to summary judgment on its motion to the extent of declaring that Cornell University is liable for contribution. The amount for which Cornell is liable is, however, another matter. A hearing needs to be held to determine its fair share.

Conclusion

For the reasons stated above, plaintiffs' motions for summary judgment are granted in their entirety. In short, plaintiffs are entitled to recover from defendant the response costs sought by them, with prejudgment interest thereon to be calculated by plaintiffs and subject to review and acceptance by the court, and to a declaration that defendant is liable for future response costs. Defendant's motion for summary judgment seeking a declaration that third-party defendant Cornell University is jointly and severally liable for the response costs incurred by the governments relative to the PAS site is also granted; a hearing is necessary, however, to determine the extent of Cornell's fair share unless, of course, Alcan and Cornell resolve the matter themselves. The Clerk is directed to enter judgment accordingly which judgment shall thereafter be amended to include the appropriate interest.

87-CV-920
(Filed September 12, 1994)
United States District Court
Northern District of New York

United States States of America
and the State of New York,

Plaintiffs,

v.

ALCAN ALUMINIM CORPORATION, et al.

Defendants.

Appearances:

Steven R. Baer, Esq., of Counsel
U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
For: *Plaintiffs*

Lawrence A. Salibra, Esq.
ALCAN ALUMINUM CORPORATION
1301 East 9th Street
29th Floor
Cleveland, OH 44114
For: *Defendants*

ORDER

On December 1, 1993, this Court entered an Order which, *inter alia*, consolidated the above captioned cases and invited counsel to brief the court on the proper scope of a hearing that has been mandated by the Second Circuit in its decision in *United States of America v. Alcan Aluminum Corp. v. Cornell*, 990 F.2d 711 (2nd Cir. 1993).

The threshold question before the court is whether evidence of the presence of additional pollutants in ALCAN's wastestream, beyond the undisputed background metals contained therein, is barred from the apportionment/divisibility hearing by the law of the case doctrine. Specifically, this court must determine whether the Second Circuit's affirmation of the district court's grant of summary judgment on the issue of liability based upon the presence of certain metals in ALCAN's waste constitutes a finding that the waste did not contain other hazardous substances.[1]

Alcan argues that it is not appropriate for plaintiffs to introduce further evidence as to the character of ALCAN's waste for two reasons. First, the legal doctrine of the law of the case precludes revisiting the issue of whether Alcan's waste contained pollutants other than the below-background level metals upon which the district court established liability. Second, additional evidence should be disallowed based upon the doctrine of res judicata. The Court will address

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1. The government contends that it can produce evidence of PCBs, volatile organic compounds (VOCs), and concentrations of metals above that conceded by ALCAN.

these arguments seriatim.

A. Law of the case doctrine:

Under the law of the case doctrine, once an issue has been decided by the appellate court, the trial court, in later stages of litigation, is under a duty to follow the appellate court's ruling on that issue. *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991); *United States v. Cirami*, 563 F.2d 26, 32-33 (2d Cir. 1977). However, upon remand the trial court may consider matters not expressly or implicitly part of the decision of the court of appeals. 563 F.2d at 33. Determination of whether the Second Circuit has already decided the nature and character of the waste requires a review of the findings and conclusions reached by appellate court in *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993).

With respect to the law of the case doctrine, the government argues that although both the district court and the Second Circuit determined that ALCAN's waste contained certain metals, there was no finding that ALCAN's waste did not also contain other hazardous substances, such as PCBs or volatile organic compounds (VOCs). The government argues, in essence, that it only went as far as necessary to establish liability on summary judgement.

With respect to ALCAN's liability, the Second Circuit made several findings, none of which establish that PCBs or VOCs were not present in the waste. First, the court held that quantity or concentration of hazardous substances is not a factor in determining liability under CERCLA. Id. at 720. Thus, minimal amounts of hazardous substances, such as the low levels present in ALCAN's wastestream, are sufficient to establish liability. Second, CERCLA imposes no

quantitative requirement; as long as a substance is identified as hazardous by 42 U.S.C. 9601(14), it is a hazardous substance irrespective of the volume or concentration of the substance found at the site in question. 990 F.2d at 720. Lastly, the court left the choice of when to address divisibility and apportionment issues to the discretion of the trial court.

On the issue of divisibility, the court applied common law tort principles and adopted a limited exception to the joint and several liability rule intending to soften its harshness in CERCLA cases. In dicta emphasizing the limited nature of the exception, the court noted that the exception would be applicable to claims "like ALCAN's where background levels are not exceeded." Id. at 722. This does not constitute a holding that ALCAN's wastestream contained only background level contaminants. Accordingly, this court finds that the law of the case doctrine does not preclude the introduction of additional evidence regarding the issue of whether ALCAN's wastestream contained PCBs, VOCs, or other metals.

B. Res Judicata (Claim Preclusion)

The doctrine of res judicata, or claim preclusion, bars a *subsequent suit* between the same parties or their privies where a prior action has resulted in a judgement on the merits of the same cause of action. *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); *see also In Re PCH Assoc.* 949 F.2d 585, 593 (2d Cir. 1991). The principle of res judicata does not apply to the case at bar because the directed hearing on apportionment/divisibility is part of the same litigation in which liability was determined, not

a subsequent action. Hence, the doctrine of res judicata does not stand as a bar to the government's introduction of additional evidence at the apportionment hearing.

Conclusion.

For the foregoing reasons, the court finds that during the hearing mandated by the Second Circuit, the government may introduce additional evidence as to the constituents of Alcan's wastestream.

IT IS SO ORDERED.

/s/Thomas J. McAvoy
Chief Judge
United States District Court

Dated at Binghamton, New York
September 10, 1994

87-CV-920
(Filed December 28, 1994)
United States District Court
Northern District of New York

ORDER

UNITED STATES OF AMERICA,
and the STATE OF NEW YORK,

Plaintiffs,

-against-

ALCAN ALUMINUM CORPORATION, et al.,
Defendants.

APPEARANCES:

UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044
for plaintiff United States

Of Counsel:
HENRY FRIEDMAN, ESQ.
Senior Attorney
Environment & Natural Resources Division

G. OLIVER KOPPELL
Attorney General of the State of New York
Department of Law
The Capitol
Albany, NY 12224
for plaintiff State of New York

Of Counsel:
DAVID A. MUNOR, ESQ.
Asst. Attorney General

ALCAN ALUMINUM CORPORATION
100 Erieview Plaza
29th Floor
Cleveland, OH 44114
for defendant Alcan Aluminum Corp.

Of Counsel:
LAWRENCE A. SALIBRA, II, ESQ.

Thomas J. McAvoy, Chief U.S. District Judge,

I. BACKGROUND

This case brought under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was remanded by a decision of the Second Circuit Court of Appeals in *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) for a hearing on the divisibility of environmental harm and apportionment of damages relating to waste emitted by the Alcan Aluminum Corporation ("Alcan").

On December 1, 1993, this court entered an order which, *inter alia*, invited counsel to brief the court on the proper scope of an apportionment hearing that

had been mandated by the Second Circuit Court of Appeals. After reviewing the briefs submitted by the parties, the court held in its order entered September 12, 1994 that the law of the case doctrine does not preclude the introduction of additional evidence regarding the issue of whether Alcan's wastestream contained PCBs, VOCs, or other metals. The court further held that the principle of res judicata also does not bar introduction of this evidence because res judicata may only be applied to subsequent actions and not to subsequent hearings in the same case. Defendant Alcan now moves for reconsideration of the September 12, 1994 order.

II. DISCUSSION

A. Standard for Reconsideration

In light of the strong interest in the finality of judgments, a motion for reconsideration "will be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision." *Motor Vehicle Mrs. v. New York State Dept. of Environmental Conservation*, 831 F. Supp. 57, 60 (N.D.N.Y. 1993) (internal quotations omitted). Stated another way, a court is justified in reconsidering its previous ruling if: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious injustice. *Larsen v. Ortega*, 816 F. Supp. 97, 114 (D. Conn. 1992). It appears that this motion for reconsideration relies on the third prong of this test: the need to correct a clear error of law or prevent manifest injustice. "With regarding to the third ground, the Court cautions that

any litigant considering bringing a motion to reconsider based upon that ground should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." *Atkins v. Marathon LeTourneau Co.* 130 F.R.D. 625, 626 (S.D. Miss. 1990). The motion for reconsideration is not a device "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977). It is in light of this standard that the court examines the reconsideration motion regarding its September 12, 1994 order.

B. Argument for Reconsideration Presented by Alcan

Alcan argues in its motion for reconsideration that the Second Circuit affirmed Alcan's liability based on the existence of trace metals and remanded the case to district court only for a hearing as to the harm, if any, associated with the metal compounds which existed below background level. It argues that since the government entities moved for summary judgment based only on the metal compounds found in Alcan's emulsion waste, they should now be precluded from showing that additional hazardous substances were present in the emulsion. Alcan argues that plaintiffs should not now be permitted to present evidence of other hazardous substances to serve as the basis for imposing response costs on Alcan.

In a condescending tone, Alcan criticizes the court's decision on the scope of the remand hearing while raising essentially the same arguments as it did in its original briefing on the subject. Defendant's brief in support of reconsideration, the reply to plaintiff's

brief, and defendant's surreply do little more than castigate the court at length for its prior decision while rephrasing the same arguments and citing to the same case law presented in its original letter briefs. As previously stated by this court, "a motion for reconsideration under Rule 59(e) is not simply a second opportunity for the movant to advance arguments already made and rejected ... absent such a showing the Court should not reconsider its previous ruling." *Motor Vehicle Mfrs.*, 831 F. Supp. at 60-61. The record before the court does not support reconsideration because defendant Alcan has not shown that the court has overlooked matters or controlling law which might have significantly influenced its prior ruling. Having examined the previous decision on this issue and the arguments now before it, the court finds that a reversal of that decision is not necessary to remedy a clear error of law or to prevent obvious injustice, and so denies defendant's motion for reconsideration.

IT IS SO ORDERED.

/s/Thomas J. McAvoy
Chief District
UnitedStates District Court

Dated December 24, 1994
at Binghamton, New York

Docket No. 95-3023
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(Filed in the Court of Appeals May 17, 1995)

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of May, one thousand nine hundred and ninty-five.

ORDER

IN RE:
ALCAN ALUMINUM CORPORATION,

Petitioner.

A petition for a writ of mandamus having been filed, Upon consideration thereof, it is ORDERED that the Writ of Mandamus be and it hereby is DENIED.

Jon O. Newman
Richard J. Cardamone
J. Daniel Mahoney

A True Copy
George Lange III, Clerk
Issued as Mandate. May 22, 1995

United States District Court,
Northern District of New York,
Civil Action No. 91-CV-1132 (Fulton Terminals Superfund Site).

Summary of Plaintiff The United States of America's discovery taken in connection with *United States v. Alcan Aluminum Corp., et al.*, United States District Court, Northern District of New York, Civil Action No. 87-CV-920 (Pollution Abatement Services Superfund Site)[1] relative to the nature and constituents of Alcan's rolling oil emulsion and the PCB contamination of Alcan's hot mill:

A. ALCAN PERSONNEL

DEPONENT	DATE
David Lagoe	11-12-89

NATURE OF QUESTIONS/TESTIMONY

Alcan's rolling oil emulsion constituents and make-up, chemical analysis of emulsion performed by Alcan and independent testing laboratories; PCB contamination of the hot mill and proposed remediation; source of PCB contamination.

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[1]Plaintiff The United States of America and The United States Environmental Protection Agency were represented by Michael Bardee, Esq., from the United States Department of Justice, and Joan Gillespie, Esq., from The United States Environmental Protection Agency in the Pollution Abatement Services case which is still pending before this Court.

NOTES

Mr. Lagoe produced "all documents pertaining to the use and presence of PCBs at Alcan Oswego since 1970, inclusive. That includes all our records on the PCB containing transformers that we have, all the laboratory analysis results, our files on PCB contamination of our north polishing pond for sediments, for remelt, casting, cooling water and also on PCB contamination of concrete in the hot mill area." (Lagoe Dep. p. 71). Mr. Lagoe also produced a copy of O'Brien and Gere's Proposal for Hot Line Remediation, Project No. 88-131, dated April 1989 and marked as Exhibit "12". (Lagoe Dep. p. 94).

DEPONENT	DATE
Steve Dubois	11-02-89

NATURE OF QUESTIONS/TESTIMONY

Products used by Alcan in the hot mill area, including the make-up of oil emulsion; O'Brien and Gere hot mill PCB remediation; sources of contamination.

DEPONENT	DATE
David Lagoe	11-27-89

NATURE OF QUESTIONS/TESTIMONY

Nature and constituents of oil portion of Alcan's rolling oil emulsion. Marked as Exhibit "16" was an Alcan Inter-Departmental Memorandum dated

January 22, 1988 containing a "summary of the PCB contamination problem" at Alcan's hot mill with an attachment containing information relating to PCB sampling throughout the hot mill.

DEPONENT	DATE
Frank Terminella	11-27-89

NATURE OF QUESTIONS/TESTIMONY

Alcan maintenance functions relating to the 100" and 120" hot mills; presence and use of hydraulic fluids and potential sources of leaks.

DEPONENT	DATE
Ronald Lamb	11-27-89

NATURE OF QUESTIONS/TESTIMONY

Alcan Maintenance Department functions relating to the 100" and the 120" hot mills; hydraulic systems.

NOTES

Plaintiff's Notice of Deposition requests the following: (1) The maintenance of the hydraulic system and the 100" mill and the 120" mill in the hot rolling operation at Alcan's Oswego facility from 1963 to 1980, including the oil(s) used in the hydraulic system; (2) All documents, including purchase invoices and maintenance records, identifying the oils used in the hydraulic system in the 100" mill or the 120" mill in

the hot mill rolling operation at Alcan's Oswego facility from 1963 to 1980, the manufacturer of each oil, and the dates of usage for each oil."

DEPONENT DATE

Steven Gosselin 11-01-89

NATURE OF QUESTIONS/TESTIMONY

Hot mill PCB remediation project and source of PCB contamination.

DEPONENT DATE

Gary Gelhoff 11-01-89

NATURE OF QUESTIONS/TESTIMONY

Hydraulic systems/transformers in hot mill area; hydraulic fluid leaks and spills; source of contamination.

DEPONENT DATE

John Gunther 11-01-89

NATURE OF QUESTIONS/TESTIMONY

Alcan's hot mill operations, maintenance and cleaning of roll tables; source of contamination.

DEPONENT DATE

Richard Dunsmoor 11-01-89

NATURE OF QUESTIONS/TESTIMONY

Cleaning of hot mill roll tables; source of PCB contamination.

B. NATIONAL ENVIRONMENTAL TESTING NORTHEAST

DEPONENT DATE

Conrad Teufel, Jr. 07-20-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - lead; PCBs.

DEPONENT DATE

Richard Balamut 07-20-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - PCBs (p. 24).

DEPONENT DATE

Trudy Preska 07-20-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - PCBs (p. 15). Transformer oils (p. 42).

C. UPSTATE LABORATORIES

DEPONENT	DATE
Anthony Scala	07-20-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - lead, PCBs (p. 16-29).

DEPONENT	DATE
Daniel Patuf	07-20-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - lead, PCBs.

D. RECRA ENVIRONMENTAL

DEPONENT	DATE
Deborah Travis	07-14-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - PCBs (pp. 22, 43, 55).

DEPONENT	DATE
Richard Finn	07-14-89

NATURE OF QUESTIONS/TESTIMONY

Testing and analysis of Alcan's rolling oil emulsion - inorganic (p. 14).

E. STUART - IRONSIDES (FARBEST CORPORATION)

DEPONENT	DATE
Charles Santangelo, Jr.	11-29-89

NATURE OF QUESTIONS/TESTIMONY

All products sold/supplied to Alcan for use in rolling oil emulsion

NOTES

At the request of the United States and the United States Environmental Protection Agency, Mr. Santangelo analyzed Farbest's oils for metals and any organic chlorinated hydrocarbons. Plaintiff's Notice of Deposition to Stuart-Ironsides (Farbest) requested designation of a person with knowledge of the following:

"(1) The date(s) on which Farbest began selling its oils B207 and B216 to Alcan Aluminum Corporation's facility in Oswego, New York;

(2) The metallic content of Farbest's oils B207 and

B216;

(3) any organic chlorinated hydrocarbons contained in Farbest's oils B207 and B216;

(4) Any chlorinated esters contained in Farbest's oils B207 and B216;

(5) Documents identifying the results of all analysis of samples of Farbest's oils B207 and B216 for the parameters or analities specified in Items (2) - (4) above;

(6) Documents identifying the results of representative analysis of samples of Farbest's oils B207 and B216 for any other parameters or analities each year since Farbest began selling those products to Alcan Aluminum Corp.'s facility in Oswego, New York ..." The requested data was marked as Exhibits during the deposition.

F. GALSON TECHNICAL SERVICES

DEPONENT	DATE
Eva Galson	07-21-89

NATURE OF QUESTIONS/TESTIMONY

Chemical analysis of Alcan's oil emulsion.

NOTES

Plaintiff's Notice of Deposition to Galson Technical Services requested a person with knowledge concerning the following:

"(1) all analyses performed by you on oil, or oil

emulsion, samples for Alcan Aluminum Corporation's facility in Oswego, New York, at any time since 1970, including, but not limited to, the analyses identified in the attached documents ...."

G. CLAYTON ENVIRNMENTAL LABS

DEPONENT	DATE
Robert Lieckfield, Jr.	07-12-89

NATURE OF QUESTIONS/TESTIMONY

Chemical analysis of Alcan's oil emulsion.

NOTES

Plaintiff's Notice of Deposition to Clayton Environmental Laboratories requested a person with knowledge concerning the following:

"(1) All analyses performed by you on oil, or oil emulsion, samples for Alcan Aluminum Corporation's facility in Oswego, New York, at any time since 1970, including, but not limited to, the analyses identified in the attached documents ...."

H. O'BRIEN AND GERE LABORATORIES

DEPONENT	DATE
David Hill	07-21-89

NATURE OF QUESTIONS/TESTIMONY

Chemical analysis of Alcan's oil emulsion "for any substances" (Dep., PP. 14-15).

NOTES

Plaintiff's Notice of Deposition to OB&G Laboratories requested a person with knowledge concerning the following:

"(1) All analyses performed by you on oil, or oil emulsion, samples for Alcan Aluminum Corporation's facility in Oswego, New York, a any time since 1970, including, but not limited to, the analyses identified in the attached documents ...." OB&G's laboratory analysis of the oil emulsion were marked as exhibits.